



**UNIVERSITY OF CAPE TOWN**  
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

**UNIVERSITY OF CAPE TOWN: LAW FACULTY**

**Evaluating the current copyright provisions for the  
reproduction and dissemination of electronic educational  
material in distance learning**

In fulfilment of part of the requirements for the degree

**M Phil in Intellectual Property Law**

By

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Date: 9 December 2014

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## Acknowledgements

I would like to express my special thanks to the following:

- My supervisor, Lee Ann Tong, for your advisory comments during the write-up of my minor dissertation.
- Mr Sibanda, you are a change agent and you have inspired me to raise my expectations and reach my full potential. I am grateful to have interacted and learnt from someone of your calibre.
- Prof. Karen Sliwa, you have inspired me as a young South African woman to overcome adversity by using the building blocks of hard work to propel oneself forward.
- All members at Amahlo Consulting, your understanding and time off to complete this thesis is commendable. The success formula is pressure before pleasure breathes pleasure.
- To my family, you have taught me how to 'cultivate the habit of being grateful for every good thing that comes to me, and to give thanks continuously. And because all things have contributed to my advancement, one should include all things in your gratitude'. I will love you always for the faith and belief you have in me.
- My husband Ayanda, you are my rock. Your support was exemplary. Your devotion in the course facilitated my enthusiasm and planted a seed of hope. Your motivation, love and care during this process were my foundation. "Love is when the other person's happiness is more important than your own." Thank you.
- To everyone who provided advisory comments during my dissertation write-up, your input was extremely valuable.

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## ABBREVIATIONS

Berne	Berne Convention
CDPA	Copyright Designs Patent Act
DALRO	Dramatic Artistic and Literary Organisation
DOC	Department of Communication
ECA	Electronic Communication and Transaction Act
eLearning	Electronic learning
GATT	General Agreement on Tariffs and Trade
ICTS	Information Communication Technology
IP	Intellectual Property
MIT	Massachusetts Institute of Technology
NRI	Network Readiness Index
OCW	Open Course Wave
OER	Open Educational Resources
OLSET	Open Learning Systems Education Trust
SA	South Africa
TELI	Technology Enhanced Learning Initiatives
TRIPS	Trade Related Intellectual Property Agreement
UK	United Kingdom
USA	United States of America
USAASA	Universal Service and Access Agency of Southern Africa
USCA	United States of America Copyright Act
WCT	WIPO Copyright Treaty
WPPT	WIPO Performance and phonograms Treaty

# **ABSTRACT**

## ***Introduction***

There is a marked increase in distance learning courses.<sup>1</sup> According to the literature, online courses have penetrated 78.09% of undergraduate level programmes and 64.3% of doctoral research institutions.<sup>2</sup> The amplified trend towards online learning courses raises questions pertaining to access to educational material online.<sup>3</sup> Digitisation has enabled the rapid copying of content and dissemination thereof to better enable access to learning for all through such digital availability of educational material. However, whether there are sufficient exceptions within copyright law to better facilitate the magnanimous growth of distance learners is debatable.

## ***Aim***

The aim of this minor dissertation is to determine whether there are international instruments such as the Berne Convention, the Trade Related Intellectual Property Agreement (TRIPs), and the WIPO Copyright Treaty (WCT) that better enable the electronic reproduction and distribution of work for distance learners. To understand the fair dealing and fair use provision specifically for distance learning in specific countries, which include South Africa, United Kingdom and United States

## ***Methodology***

A large literature search was undertaken, which included legislation, published journal articles, websites and magazines to characterise the current state of access to educational material for distance learners in SA, UK and USA.

## ***Findings***

The findings show that there is not sufficient room for access to educational material for distance learners in a fair dealing model. This can be demonstrated in the enumerated list that must be adhered to for fair dealing to subsist.

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<sup>1</sup> Lewis, L., Snow, K., Farris, E., & Levin, D. (1999). *Distance Education at Postsecondary Education Institutions: 1997–98* (NCES 2000–013). U.S. Department of Education, National

<sup>2</sup> Allen, I. E., & Seaman, J. (2005). *Growing by degrees: Online education in the United States*. Needham, MA: Sloan Consortium.

<sup>3</sup> Waits, T., & Lewis, L. (2003, July). *Distance Education at Degree-Granting Postsecondary Institutions: 2000–2001* (NCES 2003–017). U.S. Department of Education, National Center for Education Statistics. Washington, DC: U.S. Government Printing Office.

This is demonstrated in section 12 of the South African Copyright Act as well as section 32-36 in United Kingdom's Copyright Designs and Patents Act. However, in the United States there has been development within the codification of fair use terms in section 107 of the United States Copyright Act that have provided provisions for multiple copies as long as the four criteria for fair use are fulfilled. Furthermore, the Digital Millennium Copyright Act was implemented which has therein specified provisions for the digitisation of a work for distance learners.

### ***Conclusion***

There are not sufficient exceptions within copyright law for access to digitised educational material for distance learners in South Africa and the United Kingdom. The current exceptions are narrow and limited. Therefore, a recommendation would be to broaden the scope of the provisions to increase the flexibility and better to accommodate access to educational material for distance learners in this information age where digital networks and access are growing exponentially. Some countries such as the United States have come to this realisation early and have started to accommodate digitisation of works and distance learning models through the Digital Millennium Copyright Act and the codification of the fair use model in section 107 of the United States Copyright Act.

# CHAPTER 1: General Introduction

## 1.1. Overview

Education is a multidirectional process that occurs in various settings, not only academia, where knowledge, values, customs and forms of behaviour are passed on to the individual.<sup>4</sup> During the education process a student can use printed works or electronic works for a complete learning experience. An example of printed works is textbooks, which are extremely expensive for learners, which in turn affects whether a learner can afford a textbook, based on its cost.<sup>5</sup> This inhibits a learner's full understanding and conceptualisation of the course, which makes access to information difficult, especially in the case of a prescribed text.

The prices of textbooks are high as a result of production costs as well as transport for distribution of the books. The digitisation of such works would reduce costs of textbooks.<sup>6</sup> Electronic copies can easily be copied and disseminated through an integrated digital network as mediated through the interconnectivity of learners online to promote distance learning in a non-traditional classroom or lecture hall setting. Most learning takes place outside of the educational institution through the use of instructional technologies and online interaction that enables the equivalent benefit acquired during face-to-face learning (see Figure 1 for the number of distance learners vs. those using contact learning: Distance learners reached 29% in 2008 and were projected to rise to 30% by 2013).<sup>7</sup>

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<sup>4</sup> Black, P., Harrison, C., Lee, C., Marshall, B., & Wiliam, D. (2004). Working inside the black box: Assessment for learning in the classroom. *Phi Delta Kappan*, 86(1), 8-21.

<sup>5</sup> My [six] textbooks were expensive, so I didn't buy [the] other textbooks [I needed]. I've had to use books I downloaded online for two mathematics modules," Kona told the *Mail & Guardian*. "These books are expensive. [We need] an awareness campaign to help make studying a lot easier for disadvantaged students," said Kona, one of Gauteng's top matric performers in 2012 entering university.

<sup>6</sup> University of the Witwatersrand second-year actuarial science student Awakhiwe Kona was awarded a R4000 bursary by the Gauteng province to buy textbooks, but because they are so expensive he has not been able to afford to buy all the ones he needs. "My [six] textbooks were expensive, so I didn't buy [the] other textbooks [I needed]. I've had to use books I downloaded online for two mathematics modules," Kona told the *Mail & Guardian*."

<sup>7</sup> University of Texas at Austin, Grant Report, "Lecture Capturing to Transform Student Learning Opportunities in Large Classes,"

[www.echo360.com/wp-content/themes/echo360\\_v2/downloads/UTAustin\\_final\\_report.pdf](http://www.echo360.com/wp-content/themes/echo360_v2/downloads/UTAustin_final_report.pdf)

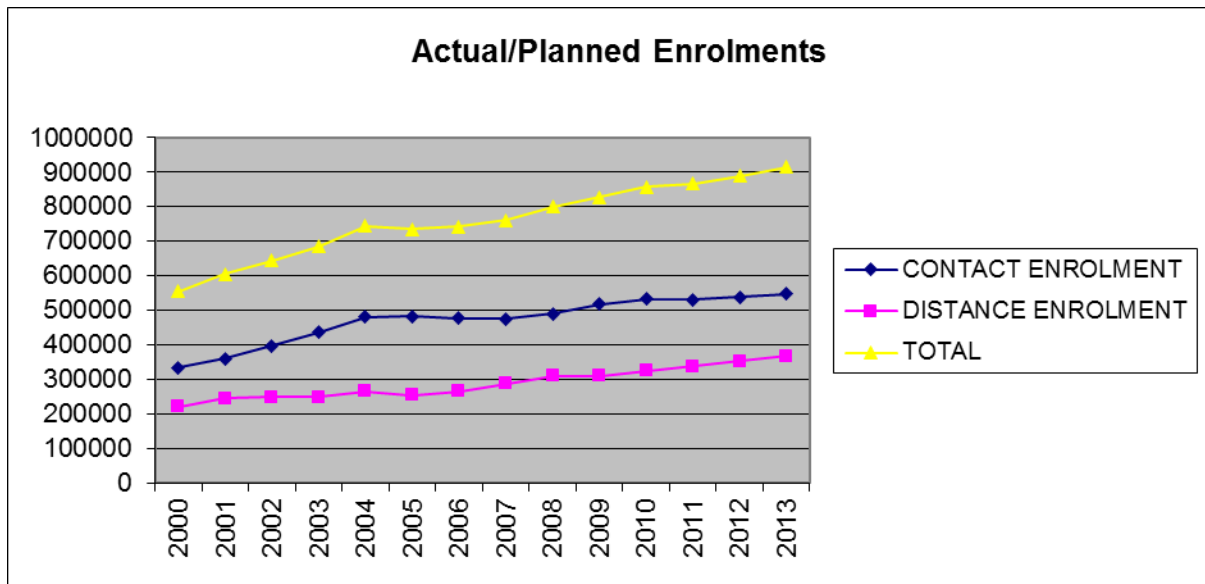


Figure 1: Numbers of Increased distance learners.

Source: DOHET

As a result of this there is an increase in the growth of distance learning universities<sup>8</sup> attributed to increased student mobility, over four million students studied abroad in 2004. African students are proportionately the most mobile, with one in 16 studying abroad, and Central Asian students are next in line.<sup>9</sup>

It is important to ensure mass access to higher education by providing open, distance and technology permitted learning through both profit and not-for-profit providers. This is progressively seen as the fundamental point of enabling mass access to higher educational opportunities. In an interview with a member of the distance learning centre, Claire Stuve stated, “Students have opportunities they wouldn’t have if they weren’t able to access distance learning courses. I really think distance learning is the wave of the future and I’m excited to see where it goes”.<sup>10</sup> The access to electronic educational material as well as the distribution thereof is important in a distance learning model.

<sup>8</sup> Matsuura, Koichiro. Forward to Perspectives on Distance Education: Lifelong Learning and Distance Higher Education, edited by Christopher McIntosh. Vancouver: Commonwealth of Learning and UNESCO, 2005.

<sup>9</sup> Daniel, John, Asha Kanwar, and Stamenka Uvalić-Trumbić. “Mass Tertiary Education in the Developing World: Distant Prospect or Distinct Possibility?” Commonwealth of Learning, 2007. <http://www.col.org/colweb/site/pid/4605>.

<sup>10</sup> Center for Digital Education interview with Claire Stuve conducted on July 9, 2012

## 1.2. Printed text books affect cost of learning and access to educational resources

A textbook is a literary work that is specific to a particular subject.<sup>11</sup> Course textbooks provide for focused learning. Almost all textbooks are collections of texts and tasks structured by the author in a way that is concise and coherent for the learner. The focus of a textbook provides conceptualisation of the topic learnt<sup>12</sup>. However, through digitisation there has been an increased growth of digital textbooks and the conversion of textbooks to electronic copies. This is as a result of need created by the proliferation of online learning. This growth is expected to increase, and is fuelled by the increased number of distance learners.<sup>13</sup> Textbooks are a rare commodity in most developing countries and can be very demotivating to learners.<sup>14</sup>

There is an extreme deficiency in the total number of textbooks per student. Given that textbook availability is the most consistent associate of academic achievement in developing countries, the price tag for access is high. There are extensive fixed costs involved when printing a textbook, which is because the cost contribution of paper is extremely variable and can range from as little as 4% of the physical production cost of a book for small print runs, to about half the cost for bigger runs (*refer to Table 1*). A potential solution to the problem is to increase the electronic dissemination of material for the purpose of teaching at a distance.<sup>15</sup>

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<sup>11</sup> <http://www.merriam-webster.com/dictionary/textbook>

<sup>12</sup> Cohen, A. (2003). Strategy Training for Second Language Learners. ERIC Clearinghouse on Languages and Linguistics.

Retrieved from [http://www.cal.org/resources/Digest/digest\\_pdfs/0302cohen.pdf](http://www.cal.org/resources/Digest/digest_pdfs/0302cohen.pdf)

26 January 2014

<sup>13</sup> Reynolds, R. (2010). Digital textbook sales in U.S. higher education: A five year projection. Retrieved from Explanation blog website: <http://blog.xplana.com/reports/digital-textbook-sales-in-u-shigher-education---a-five-year-projection/>

<sup>14</sup> Video Report of the Conference of Ministers of Education of the African Union (COMEDAF), 8-11 April 2005, Algiers, Algeria.

<sup>15</sup> George Friedman, *The Next 100 Years: A Forecast for the 21st Century* (New York, New York: Doubleday, 2009), 17-18

**Table 1: Paper cost as a percentage of total paper, printing and binding costs of textbook**

Print run	250	500	750	3 000	5 000	10 000
Paper cost as percent of total paper, printing and binding cost	4.0%	7.3%	10.2%	34.0%	40.7%	46.6%

*Note: The three smaller print runs are for a teacher's guide and the three larger ones for a textbook. The teacher's guide is printed on less expensive paper and has fewer pages than the textbook. The increase in paper cost from 750 copies to 3000 copies is thus overemphasised. Nevertheless, the trend remains clear.*

*Source: Industry role players, 2006 and Genesis Analytics calculation*

The works and subject matter used as teaching resources may have been created or produced with the express purpose of being used for teaching and learning (for example. text books, educational videos, educational multimedia, and maps), or they may be works and subject matter created without this in mind but suitable for use for educational purposes (for example works of literature cinema, plastic works of art).<sup>16</sup>

However, education benefits from the constant creation of works and subject matter that can be used as teaching resources. Hence, it would be beneficial for education if there is a system of incentives for artistic and literary creation such as the one provided by the laws of copyright and related rights.<sup>17</sup>

Without this incentive, it is submitted that the creation and production of works can be expected to fall in terms of quantity and quality, thereby depriving teaching of its resources and tools.<sup>18</sup> Nevertheless, in order to increase the coverage and quality of education, in certain specific cases it is also appropriate for works to be used as teaching resources without the authorisation of the right holder or the payment of a license or fee. With this in mind, international agreements and laws on copyright recognise limitations or exceptions for teaching purposes.

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<sup>16</sup> Pierre Sirinelli, "Exceptions and Limits to Copyright and Neighboring Rights". Presented at the Workshop on Implementation Issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Geneva, 6 and 7 December 1999. Document available [online] at [http://www.wipo.int/meetings/es/details.jsp?meeting\\_id=3944](http://www.wipo.int/meetings/es/details.jsp?meeting_id=3944).

<sup>17</sup> An economic analysis of education exceptions in copyright, PWC, March 2012, viewable at p74 awards of [www.ipo.gov.uk/response-2011-copyright-cla.pdf](http://www.ipo.gov.uk/response-2011-copyright-cla.pdf), accessed 14 October 2014

<sup>18</sup> L.Williams, Distance learning: Making a connection, daily press.com, accessed 12 September

Thus, access to educational material remains overtly expensive for the larger population. Cost drivers that are particular to the publishing industry are as follows; cost of content (i.e. author royalties), origination costs (typesetting, editing and so forth), and cross-subsidisation costs (see table 2 for book pricing breakdown).

**Table 2: Cost breakdown of the retail price of an educational book**

<b>Cost breakdown of book retail price</b>	<b>Percentage</b>
Printing, paper and binding	11.5
Origination	13.5
Royalties	10.5
Publisher's overheads	29.0
Distributor/ distribution	5.5
Bookseller	30.0
<b>Total</b>	<b>100.0</b>

*Source: Industry role players, 2006 and Genesis Analytics calculation*

It becomes increasingly important that innovative means of retrieving knowledge from educational material be proposed in the form of distance learning.<sup>19</sup> The expansion of technology, digital and internet content can reduce the quantity of paper and ink used to print a textbook as well as reduce the high transport costs. This can be addressed through the utilisation of technology whereas high-quality work can be copied and distributed at a click of a button.<sup>20</sup>

The use of educational material in electronic format for distance learning may potentially reshape the relationship between the creator of the work and the end user. It is submitted that access to educational materials is a factor in the quest to improve education and that in itself comprises many elements.

<sup>19</sup> Evans, Terry, Margaret Haughey, and David Murphy, eds. *International Handbook of Distance Education*. Bingley, UK: Emerald Group Publishing Ltd., 2008

<sup>20</sup> Hutchison, Maureen, Tony Tin, and Yang Cao. "'In-Your-Pocket' and 'On-the-Fly': Meeting the Needs of Today's New Generation of Online Learners." In Anderson, *The Theory and Practice of Online Learning*, 201-19.

Therefore, it is important that other methods of education outside of traditional methods of face-to-face teaching be explored as teaching resources in the form of textbooks are too expensive for most learners to sustain, many learners resort to making more photocopies than are actually prescribed.<sup>21</sup> The digitisation of works enables easy copying and distribution thereof. Thus the core proposition determines whether the right to access to electronic educational material can be extended to distance learning. Furthermore, a comparative inquiry was undertaken to understand the differences or similarities in face-to-face or distance learning.

### **1.3. Face-face versus distance learning**

In the 1990s distance learning was criticised on the grounds that it reduced education to a mere process of industrial production.<sup>22</sup> Scholars were of the opinion that conventional teaching methods were simply adapted to distance learning.<sup>23</sup>

In general, students can learn to an equal level in both learning models. In 2008 the extent to which learners were happy with a distance learning model as compared to face-to-face teaching suggested that students were generally satisfied with both distance and face-to-face learning.<sup>24</sup> Empirical investigations reveal that the achievement and satisfaction in different learning styles, found that no significant differences existed between online learning and traditional learning groups.<sup>25</sup> A study conducted in 2008 showed that students that were interested in perceived high

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<sup>21</sup> In August 2008, press reports stated that the University of Limpopo had purchased a Xerox Nuvera 144 Digital Production System that permitted it to copy entire textbooks with a saving of 94 per cent on the cost of purchasing original texts. The reason for purchase of such a machine was to enable poorer student's access to reading materials through the mass reproduction and dissemination. DALRO contacted the University with immediate effect to establish whether the University of Limpopo were in breach of their licence. No further press reports have been published on this matter and it appears that the matter has been satisfactorily resolved.

<sup>22</sup> Peters, O. (1993). Understanding distance education. In K. Harry, M. Hohn & D. Keegan (Eds.), *Distance education: new perspectives*, London: Routledge, 10-18.

<sup>23</sup> Shaw, K. (2001). Designing online learning opportunities, orchestrating experiences and managing learning. In J. Stephenson. Another paper is; Johnson, D., Sutton, P., & Poon, J. (2000). Face-to-face vs CMC: student communication in a technologically rich learning environment, Retrieved February 20, 2009, from [http://www.ascilite.org.au/conferences/coffs00/papers/daniel\\_johnson.pdf](http://www.ascilite.org.au/conferences/coffs00/papers/daniel_johnson.pdf). (Ed.), *Teaching and learning online: Pedagogies for new technologies*, Sterling, VA: Stylus, 53-66.

<sup>24</sup> Blankson, J., & Kyei-Blankson, L. (2008). Non-traditional Students' Perception of a Blended Course: Integrating Synchronous Online Discussion and Face-to-Face Instruction. *Journal of Interactive Learning Research*, 3 (19), 421-438.

<sup>25</sup> Lim, J., Kim, M., Chen, S. S., & Ryder, C. (2008). An Empirical Investigation of Student Achievement and Satisfaction in Different Learning Environments. *Journal of Instructional Psychology*, 35 (2), 113-119.

levels of collaborative learning were inclined to be more satisfied with their distance learning model than those who perceived low levels of collaborative learning.<sup>26</sup>

The efficacy of face-to-face and online learning was compared by Solimeno et al. (2008).<sup>27</sup> Overall, their results demonstrated that distance learning online has the ability to increase professional competences (time management, working independently) through the provision of innovative educational opportunities to fit the particular needs of students which has led to an increase in distance learning universities<sup>28</sup>.

The significant question raised is whether the copying and distribution of educational material or teaching resources in an electronic format in the distance learning model contravenes the rights of the author/creator who holds the necessary copyright protection, and if so, what are the necessary exceptions to ensure access to educational material or teaching resources to prevent disadvantaging distance learners?

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<sup>26</sup> Berger, H., Eylon, B. S., & Bagno, E. (2008). Professional Development of Physics Teachers in an Evidence-Based Blended Learning Program. *Journal of Science Education and Technology*, 4 (17), 399-409.

<sup>27</sup> Solimeno, A., Mebane, M., Tomai, M., & Francescato, D. (2008). The Influence of Students and Teachers Characteristics on the Efficacy of Face-to-Face and Computer Supported Collaborative Learning. *Computers & Education*, 51 (1), 109-128.

<sup>28</sup> Matsuura, Koichiro. Forward to *Perspectives on Distance Education: Lifelong Learning and Distance Higher Education*, edited by Christopher McIntosh. Vancouver: Commonwealth of Learning and UNESCO, 2005.

#### **1.4. Hypothesis and Objectives**

The hypothesis of this minor dissertation is that improved flexibilities within Copyright Law can increase access to educational material through the use of the distance learning model. The purpose of the study is to determine what provisions are available for Distance Learning within the copyright regime.

The following objectives have been set out:

1. To determine whether Distance Learning is a good model for access to educational material
2. To evaluate the Berne Convention, TRIPs Agreement and the WCT to determine what are the provisions for the copying and distribution of educational material
3. To explore the model of fair use versus fair dealing in different countries such as UK, SA and USA.

# CHAPTER 2: The relationship between electronic materials used in distance learning and copyright

## 2.1. Overview on distance learning

In distance learning the student or learner is separated from the teacher. This separation is relative both to time and space. It generally involves the delivery of instruction in the absence of the teacher.<sup>29</sup>

The movement toward online courses raises questions about the ownership of course materials. A topic that can increase tensions is the rights and responsibilities associated with copyright protection in education.<sup>30</sup> The purpose of this chapter is to address issues that relate to the copying of digital resources and distribution thereof for increased portability in distance learning. Information technology has changed the form of communication and enhanced collaborative interactive education for distance learners.

## 2.2. ICTs capacity for enhancing distance learning

Learning requires a structured use of learning materials delivered to the student via a variety of different modes. The delivery of material can be in a variety of forms: 1) brief on campus correspondence by the student, 2) via the internet, 3) on a student website, 4) posted via the Post Office, 5) sent via email, 6) or communicated over student radio which was the main form of communication prior to the advent of computers in the 1990s.<sup>31</sup>

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<sup>29</sup> Twigg, C. A. (2000). Who owns online courses and course materials? Intellectual property policies for a new learning environment. Troy, NY: Center for Academic Transformation

<sup>30</sup> Lape, L. G. (1992). Ownership of copyrightable works of university professors: The interplay between the copyright act and university copyright policies. *Villanova Law Review*, 37, 223 – 269.

<sup>31</sup> Baker-Albaugh, P.R. (1993), What we see is not what we get, *Journal of Instruction Delivery Systems*, 7(3), pp.36-39.

The distribution of a work requires its reproduction, in order to reproduce or copy a work the author of the work must be asked for permission to use the work to prevent copyright infringement.<sup>32</sup>

This can pose a significant problem to distance learners. Thus the issues at stake are the reproduction of material into an available electronic form and in turn making those materials available to learners electronically from a distance. ICTS has extended the budding interaction between distance learners with instructors, tutors, fellow learners, which is one of the key factors that affect access of electronic educational material. The opportunity to discuss content online has led to the satisfaction of the distance learners (see *Table 3 on the growth of ICTS infrastructure*).<sup>33</sup> Thus the capacity of ICTS usage is important in reaching learners in remote areas. South Africa has a vibrant ICT sector with an annual investment of USD\$9.6 billion and the most modern and best developed telephone system in Africa.<sup>34</sup> It is reported that the Networked Readiness Index (NRI), covering a total of 115 economies in 2005-2006, to measure the degree of preparation of a nation or community to participate in and benefit from ICT developments.<sup>35</sup> Yet, most of South Africa's infrastructure is also poorly linked and spread unevenly throughout the country.<sup>36</sup>

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32 Townsend, E. (2003). Legal and policy responses to the disappearing "teacher exception," or copyright ownership in the 21st century University. 4 Minn. Intel. Prop. Rev. 209. Retrieved May 1, 2005, from <http://mipr.umn.edu/archive/v4n2/townsend.pdf>

33 McLure, C.R. and Lopata, C.L. (1994). Assessing the Academic Networked Environment: Strategies and Options Coalition for Networked Environment. Washington, D.C.

34 The WEF ranks South Africa 37th out of the 115 economies. survey of ICT and education in Africa: South Africa Country Report South Africa - [www.infodev.org](http://www.infodev.org)

35 The WEF ranks South Africa 37th out of the 115 economies. Survey of ICT and education in Africa: South Africa Country Report South Africa - [www.infodev.org](http://www.infodev.org).

36 Africa's Top Ten Implementer Countries 2005. in [ClickAfrique.com](http://www.clickafrique.com) <http://www.clickafrique.com/Magazine/ST014/CP0000000642.aspx>, Accessed 22 September 2014.

**Table 3: ICTs Infrastructure in Africa**

ICTs INFARSTRUCTURE	
Indicator	Total number (million)
Fixed line subscriber	4.7
Mobile subscriber	23.1
Dial up subscriber	1.08
Broad band subscriber	165.290 thousands
Internet user	3.6
Television	556
Radio station	14 (for AM shows), 347 (FM) thousands

Source: Adapted from <http://www.infodev.org/>.

The Department of Communications (DOC) leads all ICT initiatives in South Africa through its Electronic Communications and Transactions Act (ECTA)<sup>37</sup>, which is an extension of its Telecommunications Act enacted in 2001<sup>38</sup> and which promotes the establishment of a Universal Service Agency (now referred to as the Universal Service and Access Agency of Southern Africa (USAASA)).<sup>39</sup> Additionally, special rates have been adhered to for students; e-rate allows discounted access to Internet services to education institutions in South Africa.<sup>40</sup>

The development of a policy regarding the use of ICTS and education has been ongoing from 1995. As a result, the Technology Enhanced Learning Initiatives (TELI) was established followed by the Feasibility Study for the Establishment of a Dedicated Educational Channel.<sup>41</sup> In 2001, the National Department of Education and the Department of Communication jointly released a Strategy for Information and Communication Technology in Education, which is believed to have laid the foundation for the e-Education White Paper adopted in 2004.<sup>42</sup>

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37 Electronic Communications and Transactions Act (ECA) of 2002

38 Telecommunications Act of 1996 and 2001

39 Survey of ICT and education in Africa:

40 Cohen, S. (2003). Report on the Use of ICTs in Schools Research Project. Johannesburg: South African Institute for Distance Education (SAIDE)

42 Online Access and Connectivity of Primary School Teachers in sub-Saharan Africa.” 2005. SAIDE. [www.saide.org](http://www.saide.org), accessed 22 September 2014

It is submitted that the specified uploading of materials onto a website for a particular distance learning course, that is password-protected would ensure the sufficient dissemination of information to prescribed learners. This may be a better mechanism to ensure that work is not copied or distributed outside of prescribed students registered for a particular course. In so doing the copying and distribution can be controlled. The use of distance learning at secondary school level (*see Table 4 below*) is not a viable option to adopt due to the poor computer penetration in schools based on the economic restraints but may be possible on a tertiary level in a South African setting<sup>43</sup>

**Table 4: Computer access and use within the various provinces**

<b>Province</b>	<b>Total Number of Schools</b>	<b>% Schools with Computers*</b>	<b>% Schools with Computers for Teaching and Learning*</b>
Eastern Cape	6,239	23.0	7.8
Free State	1,842	77.3	25.9
Gauteng	1,897	94.5	78.8
Kwazulu Natal	5,653	43.6	12.0
Mpumulanga	1,863	52.9	16.3
Northern Cape	422	91.0	60.4
Limpopo	4,187	41.8	8.7
North West	2,025	67.6	29.7
Western Cape	1,454	97.0	76.6
National	25,582	50.9	22.6

Source: Infodev Documents adapted from:

[http://www.infodev.org/infodevfiles/resource/InfodevDocuments.pg\\_429.pdf](http://www.infodev.org/infodevfiles/resource/InfodevDocuments.pg_429.pdf)

<sup>43</sup> N. Easterday, Distance learning & 2-year Colleges, community C.J of Research Prac., 1997 at 21(1), 23-26; Jaschil, Surge in Distance Education at Community Colleges, Insidehighered.com, <http://insidehighered.com>, Accessed 12 September 2014.

### 2.3. Accessing educational material through open access

The emerging development in open access is the availability of open textbooks and coursework materials that can be denoted as a body of educational content made openly available via the internet<sup>44</sup>. These educational materials are available with non-restrictive licences that permit the distribution of electronic educational material.<sup>45</sup>

Open access reduces cost and is directly correlated with increased accessibility and enhanced usability, which in turn improves the learning outcome for distance learners.<sup>46</sup> There are a limited number of local programs and organisations committed to the development of digital content for use in schools.<sup>47</sup> LearnThings and Intel's Skool.com programs are examples of imported curriculum content for distance learning. South African programs include Mindset and the Learning Channel<sup>48</sup> which were developed to encourage open source educational material; both programs have creative common licensing. Mindset has also successfully rolled out to 1,500 schools and 300 health clinics<sup>49</sup> and hospitals across South Africa.<sup>50</sup>

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<sup>44</sup> Open access to educational resources; includes lecture notes, demonstrations, simulations, illustrations, learning objects, reading, material used for illustration or demonstrations and displays. The purport of OER is to have an open movement worldwide to explore effective systems to create, share, and evolve educational material. This will be core in improving access to distance learners.

<sup>45</sup> For definitions of an open textbook, see also Appendix A of this article and the Connexions page "What are Open Textbooks?" available at <http://cnx.org/content/m15226/latest/> (accessed March 13, 2009).

<sup>46</sup> Baraniuk, Richard. 2008. "Challenges and Opportunities for the Open Education Movement: A Connexions Case Study." In Toru Iiyoshi and M.S. Vijay Kumar, eds., *Opening Up Education: The Collective Advancement of Education Through Open Technology, Open Content, and Open Knowledge*, 229-246. Cambridge, MA: MIT Press

<sup>47</sup> Cerniewicz, L., N. Ravjee and N. Mlitwa. N. Higher Education Monitor: Information and Communication Technologies and South African Higher Education: Mapping the Landscape, Council on Higher Education. 2006. [www.che.ac.za/documents/d000127/1\\_ICTs\\_Landscape\\_Jul2006b.pdf](http://www.che.ac.za/documents/d000127/1_ICTs_Landscape_Jul2006b.pdf) 34, <http://www.csae.ox.ac.uk/resprogs/usam/default.html>. (The broad definition of the unemployed include those who are part of the economically active population not employed and who are discouraged from seeking employment, Accessed 22 September 2014.

<sup>48</sup> Education Southern Africa, *Life Long learning magazine*, volume 8 No. 7 July 2014, <http://www.edusamag.co.za/magazines/2014/EducationSAJuly2014.pdf> accessed 28/10/2014

<sup>49</sup> [www.mindset.co.za](http://www.mindset.co.za)

<sup>50</sup> [www.mindset.co.za](http://www.mindset.co.za)

The Thutong portal also affords access through a wide range of curriculum and support materials that are contextually relevant for specific course material.

This has reached 15,843 registered users.<sup>51</sup> It is submitted that there is sufficient evidence to support interest in open accessibility of electronic educational material.<sup>52</sup>

#### **2.4. Future of Distance learning**

In South Africa (SA) there are a few distance learning programs that have been initiated to ensure that accurate information based on a specific curriculum are accessible by learners to improve the knowledge base of both the teacher and learner. In 2008 there were 310 259 public higher education students studying through distance education in South Africa.<sup>53</sup>

This made up 38.8% of all higher education learners according to the headcount of all enrolled learners in the country.<sup>54</sup> Since this time the figure has oscillated between 40.5% and 34.4% in 2000-2005 respectively.<sup>55</sup> A large portion of distance learners (85%) were registered with South Africa's only single distance learning institution,<sup>56</sup> the University of South Africa (Unisa-261 294).<sup>57</sup> Nevertheless, there were significant enrolments at other institutions as well these included the North West University (21 268), University of Pretoria (13 939) and University of KwaZulu-Natal (6 847)<sup>58</sup>.

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<sup>51</sup> [www.thutong.co.za](http://www.thutong.co.za)

<sup>52</sup> Massachusetts Institute of Technology (MIT) is well known for its massive Open Course Wave (OCW). MIT Open Courseware produces and has made available 1,900 courses available on the internet at no cost for non-commercial gain. It has been suggested by MIT that evidence demonstrates the process of sharing materials within the institutions has improved interdepartmental activity and sharing of lectures instead of starting from scratch which has in avertedly improved their productivity. In Africa there are also OCW initiatives such as free course wave offered by the University of Western Cape and the University of Cape Town's open content site which enables end users to access teaching material.

<sup>53</sup> Department of Education (2010a). *Education Statistics in South Africa – 2008*. Pretoria: DoE. Available at [www.education.gov.za](http://www.education.gov.za)

<sup>54</sup> Ibid Department of Education (2010a).

<sup>55</sup> Ibid Department of Education (2010a).

<sup>56</sup> According to the UNISA website, this refers to an approach or philosophy which combines the principles of learner centeredness, lifelong learning, flexibility of learning facilitation provisioning, removal of barriers to access, recognition of prior learning, provision of relevant learner support, and construction of learning programs in the expectation that learners will succeed; and the maintenance of rigorous quality assurance with regard to the design of learning materials and support services

<sup>57</sup> Ibid Department of Education (2010a).

<sup>58</sup> Department of Education (2010a). *Education Statistics in South Africa – 2008*. Pretoria: DoE. Available at [www.education.gov.za](http://www.education.gov.za)

It is submitted that the harsh realisation that distance learners and educators can be charged for copyright infringement is a growing threat that can be addressed only by improving the flexibilities in the Copyright Act and current Education Policies.<sup>59</sup>

## **2.5. Copyright specification on distance learning**

The key strength of distance learning is in its ability to duplicate and distribute content to a large number of people, which raises concern as to whether there are sufficient exceptions and limitations in Copyright Law for distance learning.

In response to this, the copyright owners are reticent to license their works to colleges and universities for the fear of unauthorised dissemination by distance learners.<sup>60</sup> Copyright law provides severe constraints on teachers regarding what can and cannot be copied, and there is great uncertainty regarding how this will be regulated in a distance learning setting.

The copyright owner has the right to control reproduction of their works and requires that permission be requested with authorisation given, before a work is copied. The right to reproduce is closely coupled with the right to authorise distribution.<sup>61</sup> However, electronic copies of digital works can be reproduced quickly and inexpensively without any noticeable loss of quality. The interconnectivity of the internet enables widespread use of the digitised information.<sup>62</sup> There is also an escalation in the ease of dissemination: one touch of a button can unleash hundreds of copies from one single digital copy via an email.<sup>63</sup>

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<sup>59</sup> In August 2008, press reports stated that the University of Limpopo had purchased a Xerox Nuvera 144 Digital Production System that permitted it to copy entire textbooks with a saving of 94 per cent on the cost of purchasing original texts. The reason for purchase of such a machine was to enable poorer student's access to reading materials through the mass reproduction and dissemination. DALRO contacted the University with immediate effect to establish whether the University of Limpopo were in breach of their licence. No further press reports have been published on this matter and it appears that the matter has been satisfactorily resolved. This incident severely demonstrates the disparity in access to educational material especially for the poor who are compelled to make copies. Students of this nature may better benefit from a distance learning model however there may still be a problem with the mass reproduction and distribution of educational material.

<sup>60</sup> AECT (1977) *The Definition of Educational Technology: AECT Task Force on Definition and Terminology*. Association for Educational Communication and Technology

<sup>61</sup> [http://www.wipo.int/edocs/pubdocs/en/intproperty/909/wipo\\_pub\\_909.html](http://www.wipo.int/edocs/pubdocs/en/intproperty/909/wipo_pub_909.html)

<sup>62</sup> M. PETERS (1998) "The challenge of Copyright in the digital age." In *Economic Perspectives, an Electronic Journal of the U.S. Information Agency*, May, Vol. 3, n. 3, p. 10.

<sup>63</sup> *Ibid* M. PETERS (1998)

Moreover, the customary lines between creators and users of copyrighted material and between private and public acts of use are gradually fading away.

The use of digital technology is indeed modifying the production, distribution, and consumption patterns of copyrighted works.<sup>64</sup> It should be noted that not only can users easily reproduce works in countless perfect copies and communicate them to thousands of other users, but they can also manipulate works to create entirely new products. Accordingly, publishers and other producers are no longer mere intermediaries in the chain of production and distribution of works, but become more active in the creative process.

The teasing question is what has then become of the traditional balance of interests between right holders and users of protected material in the digital networked environment? The debate stems not only from the fact that limitations on copyright and related rights have never been harmonised at the international level, but also from the fact that there is no overriding consensus on how to adapt these limitations to the digital networked environment.<sup>65</sup>

Problems that may arise from distance learning as denoted by Louise Moran are as follows;<sup>66</sup>

- (i) 'Pupils lack access, because access is controlled by teacher/lecturer. Virtual or distance educators select and reproduce the material of others for the benefit of their pupils, instead of letting each pupil make his/her own copies under the system of limitations and exceptions.'<sup>67</sup>

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<sup>64</sup> *Cubby v CompuServe* 766 F Supp 135 (SDNY, 1991), for example was one of the earliest cyberlaw cases of any kind to be decided, in 1991, and concerned ISP liability for a user's libel hosted on a CompuServe forum. A Dutch prosecution of an ISP for hosting copyright material was also reported in 1991, see DTL Oosterbaan, et al, 'eCommerce 2003: Netherlands' in *Getting the Deal Through: eCommerce 2003 in 25 Jurisdictions Worldwide* (Law Business Research Ltd, 2003).

<sup>65</sup> The best evidence of this is the adoption of the WIPO Treaties: WIPO Copyright Treaty, adopted by the Diplomatic Conference, Geneva, December 20, 1996, [hereinafter the 'WCT']; and WIPO Performances and Phonograms Treaty, adopted by the Diplomatic Conference, Geneva, December 20, 1996 [hereinafter the 'WPPT' and collectively referred to as 'WIPO Internet Treaties']

<sup>66</sup> Louise Moran. Distance Education and Copyright. UNESCO, Copyright Bulletin, April – June 1999, p. 13.

<sup>67</sup> Louise Moran. Distance Education and Copyright. UNESCO, Copyright Bulletin, April – June 1999, p. 13

(ii) 'Who is the owner of the work? The original teaching materials created by these teachers to be used in distance education are themselves copyright-protected works. This raises the question of whether they should be the property of the institution or the teacher who created them. There is conflict between teachers/lecturers and institutions because institutions would like to own the work created by the teacher for the institution's benefit. This benefit may not trickle down to the teacher/lecturer.'<sup>68</sup>

(iii) 'The distribution of work should be done carefully'. Given that Internet accentuates this situation of distribution; distance educators must remain alert to copyright. However, this does not make us experts.'<sup>69</sup>

## 2.6. How is copyright protection connected to education?

Copyright is the legal right that protects the expression of an idea and not the idea itself.<sup>70</sup> No formalities are required to be entered into for copyright protection to subsist. The author of the idea is afforded protection under the Copyright Act.<sup>71</sup> It is therefore important that the rights of the owner are harmonised to ensure that the public have access to information.

In recent years, there has been increased global lobbying for the stronger intellectual property protections, with individual private interests gaining traction.<sup>72</sup> On the other hand, collective public interests seem to be stagnant or even left behind. This emerging new global IP regime threatens to have a negative impact on developing countries.

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<sup>68</sup> Louise Moran. Distance Education and Copyright. UNESCO, Copyright Bulletin, April – June 1999, p. 13

<sup>69</sup> Louise Moran. Distance Education and Copyright. UNESCO, Copyright Bulletin, April – June 1999, p. 13

<sup>70</sup> Kelley, K.B., Bonner, K, McMichael, J.S., Pomea, N. (2002). Intellectual property, ownership and digital course materials: A study of intellectual property policies at two- and four year colleges and universities. *Portal: libraries and the academy* 2(2), 255-266.

Retrieved December 1, 2014 from Project Muse database.

<sup>71</sup> Copy Right Act 98 of 1978

<sup>72</sup> Kelley, K.B., Bonner, K, McMichael, J.S., Pomea, N. (2002). Intellectual property, ownership and digital course materials: A study of intellectual property policies at two- and four year colleges and universities. *Portal: libraries and the academy* 2(2), 255-266.

As stated by the UNCTAD-ICTSD Project on IPRs and Sustainable Development:

*“... for developing countries, the emerging global IP regulatory regime appears to place severe constraints on the policy ‘space’ available to them to devise and implement IP policies that are supportive of development goals.”<sup>73</sup>*

Although developed countries are the minority it seems they have a major influence on the copyright laws of developing countries which are still resource constrained, with the result that there is an increased price tag on access to information or educational material. The author or owner of a copyright work is granted certain exclusive rights to exclude others from reproduction of the work. These rights inhibit access to the author’s work without permission.<sup>74</sup> These are regarded as the private rights of the owner of a work. Copyright constitutes a default and automatic all-rights-reserved situation. Thus, in order to make use of the majority of works, permission is required for reproduction and distribution of copyright protected work.

Developing countries expressed concern during the negotiations of the 1996 WIPO treaty about the impact of this provision on national sovereignty over national copyright law exceptions (which the Berne Convention had traditionally reserved to Member States). Accordingly, the three-step test was included in the 1996 WIPO Copyright Treaty (WCT Article 10).<sup>75</sup> The WCT and WPPT formulation also applies to existing exceptions under the Berne Convention, with regard to the ability of countries to create new exceptions and limitations to facilitate domestic needs.<sup>76</sup>

As a result, the Agreed Statements Concerning the WIPO Copyright Treaty were adopted by Member States, to make clear that the intention was to preserve countries’ existing copyright law exceptions and give countries the flexibility to introduce new copyright exceptions and limitations appropriate for the digital environment in order to meet domestic needs, such as distance education.

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<sup>73</sup> UNCTAD-ICTSD Project on IPRs and Sustainable Development

<sup>74</sup> S. Morolong, Copyright in the Digital Environment : An Assessment of the Botswana Copyright and Neighbouring Rights Act of 2000, University of Botswana Law Journal, Vol 17 Issue 3, 2006, p. 17-18.

<sup>75</sup> WIPO Copyright Treaty. (adopted in Geneva on December 20, 1996)

<sup>76</sup> Ruth Okediji, Welfare and Digital Copyright in International Perspective: From Market Failure to Compulsory Licensing, in international public goods & transfer of technology under a globalised intellectual property regime” (Jerome Reichman & Keith Maskus, eds., Cambridge University Press, forthcoming 2005), at (discussing the stages of copyright multilateralism and the structure of the Berne Convention.)

In terms of Article 10 of the WCT does not expand or reduce the scope of existing exceptions under the Berne Convention.<sup>77</sup>

There is a counter-institutive paradox that exists between copyright protection and education. Given that the creator of a work has put time and effort to create a work such as a textbook, the owner of the work and hence the copyright holder therein is entitled to financial gain for access to the information unless the public has been authorised to access the work freely.

This could create a burden on access to educational material at a price. The challenge therefore is in balancing the interests of the copyright owner in having his/her works protected sufficiently but still nurturing the rights of a learner or access of the work for educational purposes.<sup>78</sup> It could be argued that the inability to find an effective balance between these rights and in particular the access to educational material has resulted in increased textbook and other works piracy.

For instance, a pirate photocopying shop was established in Empageni, Kwa Zulu Natal operating large scale copying of copyright protected works.<sup>79</sup> Following a group of publishers working together to collect evidence that their rights were being infringed, the owner of the shop was sentenced to three years in prison or a fine of R30,000.

In the Western Cape, DALRO (Dramatic Artistic and Literary Organisation) requested the police to perform a raid of two shipping containers located close to a tertiary institution, from which a large number of photocopies were being made. All infringing copies that had been made from the master copies and machinery were confiscated based on the reproduction of a work without the permission of the rights holder and potential distribution based on the quantity the copies made.

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<sup>77</sup> Hugenholtz, P.B. & Okediji, R.L. 2008, conceiving an International Instrument on Exceptions and Limitations to Copyright, Open Society Institute, available at: <http://www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf>, accessed 22 September 2014.

<sup>78</sup> [www.aca2k.org](http://www.aca2k.org); (accessed on 18 August 2013)

<sup>79</sup> Gray and Seeber PICC report on intellectual property rights in the print industry(2004) available at <http://publisher.co.za>

However, there was no civil or criminal action<sup>80</sup> (The facts outlined for this case are gleaned from publication and interviews).

If one copy was done electronically and emailed to several people in the comfort of one's home, it is debatable whether DALRO would be aware of this infringement until it was too late, after the distribution of the copy<sup>81</sup>.

Hence it shall indeed be argued that it important to maintain a balance between the private rights of the owner and the public interest for access to information, ensuring that the price tag for access should be moderated.<sup>82</sup> In future, there must be sufficient exceptions and limitations to the exclusive rights of the copyright owner to use of digitised work distance learning. However, it is important to ensure that such use of the work is both fair and done in a reasonable manner.

There needs to be a balancing act between the stores of wealth in society (owners/authors of a work) which must be coupled with the public's right to access to information, which in turn would lead to the further accumulation of wealth for society. There must be a mechanism to ensure a balance and govern the tensions of the copyright owner's desire to restrict access to only those that are willing to pay versus the overall public interest in a work for which many are unable to pay.<sup>83</sup>

It is indisputable that the granting of exclusive rights to copyright holders has caused undesirable economic and social costs including; high monopolistic prices, limited access to knowledge material and reduced information dissemination.<sup>84</sup>

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<sup>80</sup> Gray and Seeber PICCreport on intellectual property rights in the print industry(2004) available at <http://publisher.co.za>

<sup>81</sup> Kirkland, K., & Sutch, D. (2009). Overcoming the barriers to educational innovation, A Literature Review. Bristol: Futurelab

<sup>82</sup> Schonwetter journal of information and communication 2006

<sup>83</sup> Schonwetter, T; Ncube, C & Chetty, P. (August 2009) 'African Copyright and Access to Knowledge (ACA2K) Project:

The role of copyright'. Shuttleworth Foundation & UCT Press. Cape Town. Juta & Co. P 245. Retrieved 20 July 2011 from

<http://link.wits.ac.za/papers/ACA2K-2010-Access%20to%20knowledge%20in%20Africa.pdf>

<sup>84</sup> V R Moffat 'Mutant copyrights and backdoor patents: the problem of overlapping intellectual property protection' (2004) 19 Berkeley Technology Law Journal 1473 at 1480-1; P B Hugenholtz Copyright and electronic commerce: legal aspects of electronic copyright management (2000) 127.

In order to curtail some of the undesirable effects and to achieve a balance of interests between public and private interests, national lawmakers ought to provide measures that can be utilised to prescribe exceptions and limitations in copyright protection.<sup>85</sup>

Statutory copyright exceptions and limitations are a paramount tool in enabling access to educational material. New knowledge is a consequence of the expansion of knowledge already known and it is by way of limitations and exceptions that innovative works are created and disseminated. A user's legitimate interests in using copyright-protected material in certain circumstances without the permission of the rights holder must be merited.<sup>86</sup>

The right of access to information, freedom of expression, freedom of education and the right to cultural participation are basic human rights, thus there is a strong link between human rights and copyright law.<sup>87</sup> It is important that public interest outweigh the proprietary interest constituted by the copyright owner's monopoly. It is the position of this minor dissertation that distance learning requires technology-enabled educational material for consultation, use, adaptation by users for non-commercial reasons. Distance learning requires the easy reproduction and distribution of such material.

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<sup>85</sup> G Davies Copyright and the public interest 2ed (2002) 236

<sup>86</sup> Naidu, S., Cunnington, D. & Jasen, C.(2002). The experience of practitioners with technology- enhanced teaching and learning. Educational Technology & Society,5,(1), 23-34.

[http://www.ifets.info/journals/5\\_1/naidu.html](http://www.ifets.info/journals/5_1/naidu.html) Accessed on January, 05, 2012

<sup>87</sup> Pienaar, D.J. (1988) 'Statutory defences against actions for infringement of copyright'. LLM thesis. University of South Africa. P 96.

## CHAPTER 3: International law and its role in access to educational material for distance learning

### 3.1. Overview

Education is an interactive system that results in the long-term acquisition of knowledge.<sup>88</sup> Various efforts must be made to ensure access to electronic educational material for distance learners and to the benefit of the general public.<sup>89</sup> This chapter will discuss the limitations and exceptions in the international instruments to harmonise Copyright in order to accommodate distance learning; and to explore specific provisions in the Berne Convention, TRIPS and WCT for distance learning or digitisation of learning material to distance learners. In addition, the Three-step Test is discussed as an exception for access to information.

Limitations on copyrights are an integral part of the copyright system and in particular, recognition of the balance between the copyright owner and the public's legitimate interest in respect of copyrighted material. This includes the legitimate interests for protection of the users' fundamental rights, the promotion of free flow of information and the dissemination of knowledge.<sup>90</sup> However, one must remember that the notion of 'legitimate interest' or 'public interest' is mostly a matter of national policy. What is in the public interest in one country is not necessarily the same in another. Technically, limitations reflect each country's assessment of the need and desirability for society to use a work against the impact of such a measure on the economic interests of the right holders. It is submitted that this weighing process often leads to varying results from one country to the next.<sup>91</sup> Additionally, it is important to note that these exemptions are provided under special circumstances. At the same time, copyright laws also developed the principle that no rights are absolute, as they could not constitute an exception to the need for relativity based on the coexistence with other rights. In an attempt to be reasonable and to balance

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<sup>88</sup> Dirk Willem te Velde, 2005

<sup>89</sup> Dirk Willem te Velde, 2005

<sup>90</sup> Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, U. L. REV. 469, 516-18 (2000).

<sup>91</sup> Guibault 1998 Council of Europe Steering Committee on the Mass Media, *Discussion Paper on the Question of Exemptions and Limitations on Copyright and Neighbouring Rights in the Digital Era*, prepared by L. Guibault, Strasbourg, 1 September 1998, MM-SPR (98) 7 rev.

rights and interests, copyright laws established a list of limitations or exceptions that enable works to be used in certain ways, and possibly without payment, without the need for prior and explicit authorisation from the relevant right holder.<sup>92</sup> For instance, where such materials may not be available on the market at the time, or where the distance to market would not justify the effort of going for it. For the material to be reproduced without prior and explicit authorisation, the request must comply with the Three-step Test advocated in the 1967 revision of the Berne Convention.

### 3.2. Three-step Test

The Three-step Test provides the fundamental standard that should be met to maintain a balance in copyright law and avoid conflict with normal exploitation.<sup>93</sup> The Three-step Test has been adopted in Article 9 (2) of the Berne Convention, Article 13 of the TRIPS Agreement and Article 10 of the WCT. The test was not implemented word-for-word into each, but was adopted with slight alterations or modifications. The aim was to broaden the appeal of the Three-step test to a variety of countries. The test was kept broad to answer to all the exceptions and limitations.

When a legislative body implements new copyright limitations or courts flexibly interpret existing limitation clauses, these have to be compatible with the 'Three-step Test' which defines the discretion to implement copyright limitations and exceptions.<sup>94</sup>

The Three-step Test appeared for the first time in 1967 at the Stockholm Conference, whose objective was to revise the Berne Convention. This conference was mainly aimed at discussing the reproduction rights at an international level.

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<sup>92</sup> Ph.D student, Hokkaido University, Graduate School of Law. This paper is in part based on Takahiro Kojima, *An Analysis of Copyright Limitations and the Three-step Test: Towards More Flexible Interpretations*, 26-30 INTELL. PROP. L. & POL'Y J. (Hokkaido Univ.) (forthcoming 2010) <Japanese>. Sincere thanks to Ryu Kojima, Peter Drahos, Peter K. Yu, the attendees of Contemporary Issues in International Economic and Business Law, Joint Hokkaido-Kyushu

<sup>93</sup> P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, Open Society Institute (2008), at 15-16., available at [http://www.soros.org/initiatives/information/articles\\_publications/publications/copyrighc\\_20080506/](http://www.soros.org/initiatives/information/articles_publications/publications/copyrighc_20080506/).

<sup>94</sup> Wilkinson, M.A. (2010). *Copyright, Collectives, and Contracts*: New

This right of reproduction had previously been absent from the Convention even though it played a major role in several national laws. Article 9 of the Berne Convention offered a vague and general criterion that allowed member countries to grant exceptions to the newly enshrined right.<sup>95</sup> It was thus a formulation of compromise, broad enough to cover all exceptions included in the legislation of signatory countries, whether under an enumerative list or under a general fair use-type clause or fair-dealing exception.<sup>96</sup>

This broad Three-step Test quickly became the cornerstone of a solution that insured the test's success, by addressing the problems in copyright law from a very broad scope.<sup>97</sup> During the negotiations of subsequent intellectual property agreements, it allowed settling the extremely sensitive question of exceptions by referring to an article of general scope, to which countries of both continental and common law tradition could relate. As such, the test was used again in the TRIPS Agreement in 1994 and extended to all economic rights.<sup>98</sup> Due to the consensual character of this legal instrument, different types of 'Three-step Tests' (their formulation sometimes varies slightly) were also enshrined.

Presenting a discrete yet not insignificant change, the third step of the test, TRIPS version, aims at protecting the legitimate interests of the 'rights holder', and not the author as stated in the Berne Convention.

The Berne Convention Article 9 (2) articulated that "*It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author*".

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<sup>95</sup> Article 9.1 of the Berne Convention

<sup>96</sup> Annette Kur, Of oceans, islands, and inland water - how much room for exceptions and limitations under the three-step test? 8 RICH. J. GLOBAL L. & BUS. 287, 332 (2009)

<sup>97</sup> John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 538, 543-548

<sup>98</sup> Article 13 of Trips

It seems that the Three-step Test is based on the assumption that the use of works is in principle controlled by the rights holder and exceptionally exempted on the condition that it “does not conflict with a normal exploitation”.<sup>99</sup> Therefore, when we interpret the Three-step Test literally, it limits the capacity for the national legislature to implement copyright limitations and thus it produces a biased result in favour of the author.<sup>100</sup>

To figure out the background of the test, it is useful to understand the test taking into account the circumstances under which the Berne Convention Article 9 (2) came into existence. It has been pointed out that the decision taken at the Stockholm Conference to include a reproduction right into the Berne Convention, which was accompanied by limitations to reproduction right in “certain special cases”, was based on the view that there was an upcoming threat of mass-reproduction.<sup>101</sup> Art. 9 (2) of the Berne Convention addresses the reproduction of a work for teaching and is also dealt with in 10(2). The copying of materials for use by students in the course of the instruction is substantiated within article 9(2). However, article 10(2) of the Berne Convention is technologically neutral and clearly intended to cover both face-to-face as well as distance learning, which includes by digital means.

This test bears strong significance because it is also integrated into Article 13 of TRIPS, Article 10 of the WIPO Copyright Treaty (WCT) and Article 16 of the WIPO Performances and Phonograms Treaty (WPPT). The WTO Panel has incidentally expressly admitted this normative approach in the framework of the interpretation of Article 13 of the TRIPS Agreement, which also provides a three-step test in patent law.<sup>102</sup> Article 10(2) WCT, neither “...reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”

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<sup>99</sup> Wilkinson, M.A. (2010). Copyright, Collectives, and Contracts: New Math for Educational Institutions and Libraries. Retrieved 10 19, 2010, from <http://www.irwinlaw.com/pages/content-commons/copyright-collectives-and-contractsnew-math-for-educational-institutions-and-libraries---margaret-ann-wilkinson>.

<sup>100</sup> [http://www.bunka.go.jp/chosakuken/singikai/housei/h21\\_shiho\\_07/pdf/shiryo\\_3\\_2.pdf](http://www.bunka.go.jp/chosakuken/singikai/housei/h21_shiho_07/pdf/shiryo_3_2.pdf).

<sup>101</sup> Tohmas Dreier, Shaping a Fair International IPR-Regime in a Globalised Wovrd. Some Parameters for Public Policy, in INTELLECTUAL PROPERTY, PUBLIC POLICY, AND INTERNATIONAL TRADE 73-4 (Inge Govaere & Hanns Ullrich eds., 2007).

<sup>102</sup> Article 13 of the TRIPS Agreement

### 3.2.1 What are the three steps?

#### **Step 1: The words in special cases**

In terms of Article 9(2) of the Berne Convention it is provided that the reproduction of an article can only be done in special cases.<sup>103</sup>

The words **in special cases** set a specific criterion or threshold that needs to be reached before reproducing a work. The national law criterion must be met before the basis for exceptions are met for the right to copy can be mediated.<sup>104</sup> The word **certain** also narrows down or limits the exception. The word **cases** refers to an occurrence or circumstance that required the reproduction of the works. The same wording has been used in TRIPs Article 13 and WCT Article 10 respectively.<sup>105</sup> The limitations and exceptions in the national legislation must be clear.

#### **Step 2: It should not conflict with the normal exploitation of the work**

This is a very dynamic concept that an exception can come into **conflict with normal exceptions or limitations**. There must be a balance between the degrees to which the work is exploited not affecting the economic versus the non-economic gain of the author.<sup>106</sup>

#### **Step 3: It should not unreasonably prejudice the legitimate interest of the author**

This is the broadest part of the Three-step Test. The words **unreasonably prejudice** could cover a legal right; this works hand in hand with the word **legitimate** which could be understood as justifiable, rightful or authorised by law. Lastly the word **interest** covers the balancing of the economic and non-economic rights.<sup>107</sup>

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<sup>103</sup> Article 9(2) of the Berne Convention

<sup>104</sup> Daniel J. Gervais, Towards a New Core International Copyright Norm: The Reverse Three-Step Test, 9 MARQ. INTELL. PROP. L. REV. 1 (2005).

<sup>105</sup> TRIPs article 13 and WCT article 10

<sup>106</sup> Daniel J. Gervais, Towards a New Core International Copyright Norm: The Reverse Three-Step Test, 9 MARQ. INTELL. PROP. L. REV. 1 (2005).

<sup>107</sup> Daniel J. Gervais, Towards a New Core International Copyright Norm: The Reverse Three-Step Test, 9 MARQ. INTELL. PROP. L. REV. 1 (2005).

The adaptations of the Three-step Test in the different legislations are important to keep the test broad and to cater more extensively to the public through the national interpretation of the exceptions and limitations. The Three-step Test has been considered as a balancing process. However, it also ensures a certain threshold of protection that must be met before it can be used for non-economic purposes by the public.<sup>108</sup>

On one hand, the Three-step Test is often used as 'rhetoric' to constrain the scope for implementing copyright limitations because it is a test for authors.<sup>109</sup> On the other hand, the minimum standard to protect copyrighted works is heightened. However, leeway to be able to make limitation clauses is limited due to the existence of the test.<sup>110</sup> Although there is the need to adopt legislations to the changing situation for creation or use of copyrighted works, policy space and national autonomy for national legislature to implement copyright limitations are decreasing.

How should we preserve policy discretion for national legislatures? One possible solution is to make the interpretation of the Three-step Test more flexible.<sup>111</sup> The Three-step Test, which limits the implementation of copyright limitations and exceptions has not worked well to maintain national autonomy to implement copyright limitations because the test was based on the conventional view in the 1960s.<sup>112</sup>

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<sup>108</sup> Kamiel J. Koelman, Fixing the Three-Step Test, 28 EIPR 407 (2006).

<sup>109</sup> J. Reinbothe, S. von Lewinski, The WIPO Treaties 1996, Butterworths, at 131 (2002).

<sup>110</sup> Annette Kur, of oceans, islands, and inland water - how much room for exceptions and limitations under the three-step test? 8 RICH. J. GLOBAL L. & BUS. 287, 332 (2009)

<sup>5</sup> Guido Westkamp, The Three-Step Test and Copyright Limitations in Europe: European Copyright Law between Approximation and National Decision Making, 56 J. COPYRIGHT SOC'Y U.S.A. 1, 7 (2009).

<sup>111</sup> P. Bernt Hugenholtz & Ruth L. Okediji, Conceiving an International Instrument on Limitations and Exceptions to Copyright, Open Society Institute (2008), at 15-16., available at [http://www.soros.org/initiatives/information/articles\\_publications/publications/copyrightc\\_20080506/](http://www.soros.org/initiatives/information/articles_publications/publications/copyrightc_20080506/).

<sup>112</sup> Kamiel J. Koelman, Fixing the Three-Step Test, 28 EIPR 407 (2006).

<sup>28</sup> 17 U.S.C. §107.

These days, it is said that the Three-step test excessively restrains national discretions to enact limitations based on their own cultural policy.<sup>113</sup>

To address this concern, on the one hand, commentators proposed that the test should not be interpreted literally but be applied flexibly to better accommodate the modality of interconnectedness on the internet and increased interactive learning through the sharing of digital resources online for distance learning.<sup>114</sup> In the subsequent sections a closer look into the Berne Convention, TRIPs and WTO will be undertaken, to determine whether there are any other provisions that may benefit for access to electronic educational resources.

### 3.3. Berne Convention 1886

The Berne Convention<sup>115</sup> has been revised several times since its inception in 1971. The Berne Convention is an international treaty that oversees copyright protection. Signatory states must recognise copyright-protected works of foreign authors in the same way that national laws recognise copyright protection for its own nationals.<sup>116</sup> The most fundamental right for a copyright holder is the right of reproduction, which was initially administered lightly due to its late incorporation, at the Stockholm Revision of 1967.<sup>117</sup> The right of reproduction existed in national laws for decades prior to its insertion in the Stockholm revision. This is also mentioned in the Statute of Anne of 1710.<sup>118</sup> The original version of the Berne Convention recognised the right to reproduction but only implicitly.<sup>119</sup>

The 1886 text made reference to partial definition of “unlawful reproductions to which this Convention applies”. The phrase unlawful reproduction was one of the most important phrases which gave rise to the insertion of national treatment.

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<sup>113</sup> Kamiel J. Koelman, Fixing the Three-Step Test, 28 EIPR 407 (2006).

<sup>114</sup> Others suggested that each step should be applied not cumulatively, but in a comprehensive manner like the American Fair Use Doctrine

<sup>115</sup> Berne Convention 1886

<sup>116</sup> Berne Convention 1886

<sup>117</sup> Berne Convention for the Protection of Literary and Artistic Works (14 July 1967), 828 United Nations Treaty Series 11850 (revised in Stockholm on 14 July 1967), <http://www.wipo.int/treaties/en/ip/berne/trtdocs>; (accessed on 24 August 2013)

<sup>118</sup> Ibid

<sup>119</sup> Berne Convention 1886, supra note 12, art. 12(1), at p. 228. (there is reference to infringing copies which would be liable to seizure)

The term 'unlawful reproduction' is open to debate because what one may understand as lawful may be deemed unlawful as per the interpretation.<sup>120</sup> The reproduction of political articles was an exception to reproduction without the knowledge of the author; this included the news of the day.

The use of the material could not be prohibited especially for teaching or scientific purposes.<sup>121</sup> However, there is no specific mention of distance learning in so far as teaching instruction when students are not located within close proximity of the teaching institution.

Furthermore, the Berne Convention also made reference to the right of reproduction for newspaper articles or periodicals.<sup>122</sup> This right could only be asserted by the author. It also contained a right of reproduction for newspapers or periodicals but the right only applied if specifically asserted by the author.<sup>123</sup> Thus if applied to distance learning every resource used online by a student would require the permission of the original author, this would contain the use of a work during face-to-face teaching for display or demonstration because the work is not reproduced, only shown. On the internet for distance learning this would equate to mass reproduction for each student that the work is sent to.

These few exceptions that existed in the first version of the Berne Convention clearly reflected the public interest but were not suitable for digitisation of works during distance learning.<sup>124</sup> This exception is of particular interest for photocopying of textbooks, workbooks or classroom material for learners.

The 1928 amendment placed specific limitations on the quantity of the work that could be copied. This particular amendment plays an important role and is applicable to lecture notes.

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<sup>120</sup> John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 538, 543-548 (2007)

<sup>121</sup> Berne Convention for the Protection of Literary and Artistic Works (9 September 1886) [Berne Convention 1886] in *Berne Convention Centenary* (WIPO, 1986), Arts. 5 and 6, at p. 228. The term of protection was ten years. Arguably, a right of reproduction was implied because the original text contained exceptions (see section 2.1.2). Additionally, there is an indirect reference to the public performance of protected works (there is an exclusive right in the public performance of translations) in Article

<sup>122</sup> John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 538, 543-548 (2007)

<sup>123</sup> Berne Convention 1886, *supra* note 12, art. 7 at p. 228.

<sup>124</sup> Berne Convention for the Protection of Literary and Artistic Works (14 July 1967), 828 United Nations Treaty Series 11850 (revised in Stockholm on 14 July 1967), <http://www.wipo.int/treaties/en/ip/berne/trtdocs>

The copying of notes by the teacher or lecturer may be deemed as copyright infringement for face-to-face learning, thus if the same notes were distributed via email or website for distance learning, the notes would be disseminated to several students in their complete form and not parts thereof, and this may be deemed as copyright infringement by both the teacher and student.

The amendments and revisions made to the Berne Convention were not specific. It is also important to note that every exception and limitations came with new rights for authors. These rights were not flexible enough for the end user. The only mandatory exception is the quotation or citation right. With this backdrop there are consistencies among the nations copyright law but there are some variations in the national laws.<sup>125</sup>

It is the only exception that has been part of the Berne Convention from its inception and through the many revisions. This right is directly related to news reporting and political discussion.

### **3.3.1 Exceptions and the limitations**

The Convention requires member states to provide adequate protection standards for copyright law.<sup>126</sup> Therefore, it has become increasingly difficult to define appropriate boundaries for both the author of the work as well as public interest.

The Convention establishes a series of limitations and exceptions that has been seen fit to classify as 'specific', 'general or broad' or 'implied'.<sup>127</sup> It also establishes some non-voluntary licences and other minor exceptions.<sup>128</sup>

The exceptions and limitations can be described as: specific (article 10(2)), general or broad (article 9(2)), implied (articles 11 *bis*, 11ter, 13 and 14 of the Convention discussed whether there were implied limitation or exception to the right of translation), non-voluntary licenses (article III of the Appendix for education).

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<sup>125</sup> It is believed that

even though there are consistencies among nations' copyright laws, each jurisdiction has separate and distinct laws and regulations covering copyright. These national laws vary greatly between countries and copyrighted works are licensed on a territorial basis

<sup>126</sup> Berne Convention for the Protection of Literary and Artistic Works (9 September 1886) [Berne Convention 1886] in Berne Convention Centenary (WIPO, 1986)

<sup>127</sup> Ibid

<sup>128</sup> SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY 601 (Oxford Univ. Press, 2008)

The wording of Article 9(1) of the Berne Convention was sufficiently broad to cover digital reproductions. The expression ‘any manner or form’ includes digital mediums like the transfer of copyright work in analogue format to a digital format.<sup>129</sup> In terms of Article 9 (2) of the Berne Convention the reproduction rights are the exclusive rights of the author, unless otherwise assigned, to reproduce their works in ‘any manner or form’.<sup>130</sup> The broad exception for the reproduction of works is also addressed in Article III of the Appendix.<sup>131</sup> Article 9(2) of the Three-step Test permits exceptions to the reproduction right of the copyright owner;<sup>132</sup>

1) *in certain special cases*

2) *that do not conflict with the normal exploitation of the work and*

3) *that do not unreasonably prejudice the legitimate interests of the author/rights holder.*

In fulfilment of these criteria the national legislators must ensure the compliance in drafting legislating and justifying all exceptions and limitations.<sup>133</sup>

Article 10(2) of the Berne Convention provides for specific provisions in teaching whereby a work utilised must have justified purpose and must be compatible with fair practice. The wording of Article 10(2) is broad and could include reproduction and distribution of a work. This would provide provision for distance learning in practice through fair practice. However, the words “by way of illustration” impose a limitation that restricts the use to predominantly Face to Face learning and not distance learning.

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<sup>129</sup> Berne Convention for the Protection of Literary and Artistic Works (9 September 1886) [Berne Convention 1886] in Berne Convention Centenary (WIPO, 1986).

<sup>130</sup> Article 9 (2) of the Berne Convention

<sup>131</sup> Berne Convention for the Protection of Literary and Artistic Works (9 September 1886) [Berne Convention 1886] in Berne Convention Centenary (WIPO, 1986).

<sup>132</sup> T. Schonwetter ‘The Three Step Test within the Copyright System’ (UCT, 2006).

<sup>133</sup> Annette Kur, of oceans, islands, and inland water - how much room for exceptions and limitations under the three-step test? 8 rich. j. global l. & bus. 287, 332 (2009)

5 Guido Westkamp, The Three-Step Test and Copyright Limitations in Europe: European Copyright Law between Approximation and National Decision Making, 56 J. copyright soc’y u.s.a. 1, 7 (2009).

6 Guido Westkamp, The Three-Step Test and Copyright Limitations in Europe: European Copyright Law between Approximation and National Decision Making, 56 J. copyright soc’y u.s.a. 1, 7 (2009)

7 P. Bernt Hugenholtz & Ruth L. Okediji, Conceiving an International Instrument on Limitations and Exceptions to Copyright, Open Society Institute (2008), at 15-168 Thomas Dreier, Shaping a Fair International IPR-Regime in a Globalised World. Some Parameters for Public Policy, in Intellectual Property, public policy, and international trade 73-4 (Inge Govaere & Hanns Ullrich eds., 2007).

9 Rochelle C. Dreyfuss, TRIPS-Round II: Should Users Strike Back?, 71 u. chi. l. rev. 3

Thus, it is argued that it excludes the entire piece of a work to be utilised,<sup>134</sup> and restricts the scope of work especially for education.<sup>135</sup> Notwithstanding this, the two major exceptions discussed are broad and flexible enough to be adapted to the modern dissemination of information which in part accommodates distance learning.

It is submitted that illustrations for teaching provision of the Berne Convention Article 10(2), may shape these various exceptions or limitations. However, there is a lack of a set of minimum exceptions and/or limitations with regard to copyright in the Berne Convention. This is clearly reflected in the practice and understanding that the precise nature of such limitations and exceptions was to be left to the reserved powers of the state to protect the welfare interests of its citizens.<sup>136</sup> South Africa has been a signatory to the Convention since 1928 and the Copyright Act is based on the provisions thereof. Since the inception of the Convention there has been a steady increase in the level of copyright protection, which serves the interest of the author as it encompasses new forms of commercial exploitation (mostly individual) human creativity with unclear or unspecified exceptions. Thus the Berne Appendix would be applicable in the South African context.

### **3.3.2 The Berne Appendix enacted in 1971**

In 1971 the Appendix to the Paris Act Revision of the Berne Convention (also known as the Berne Appendix) was implemented. The Appendix contains provisions which are extremely complex and obscure. This has resulted in very few developing countries adopting and utilising it.<sup>137</sup>

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<sup>134</sup> Guibalt et al., 2005;pg15

<sup>135</sup> Xalabarder et al., 2007

<sup>136</sup> Andrés Moncayo von Hase, The Application and Interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights, in intellectual property and international trade: THE TRIPSAGREEMENT 93, 134 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 1998).

<sup>137</sup> According to our count, only fifteen countries have filed declarations under article 1 with respect to the facilities provided by articles II and III. WIPO, Notifications, [http://www.wipo.int/treaties/en/ShowResults.jsp?search\\_what=N&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?search_what=N&treaty_id=15) (last visited Jan. 11, 2007) (notification numbers 79, 91, 109, 110, 232-40, 245, and 248)

Examples of such complexity include waiting periods ranging from three to seven years to get a licence, after which the author can still terminate the licence at any given time, and different provisions for translation and reproduction licences, which cover the same works.<sup>138</sup>

There is unwillingness among developing countries to adopt the Berne Appendix which robustly promotes the use of compulsory licensing provisions. It is submitted that there are restrictive exceptions in the Berne Appendix that do not allow a country issuing a licence to print books domestically but rather to extend that license to the publication of books outside of the country with the purpose of importing them.<sup>139</sup> However, the question as to whether the use of the Appendix refers to the digitisation of the work most especially for educational material usage is unclear. If yes, this will give rise to a licence approach that could favour distance learning. However, a licence can only be administered for the purpose of instruction or research purposes. Article 3 of Berne Appendix paragraph (a) and (b) has a waiting period of three months to access a work.<sup>140</sup>

Article 2 paragraph 1 and Article 3 (7) (a) and 9 (b) of the Berne Appendix imply that the licence for reproduction covers a summary of a work. It applies particularly to works that are printed.<sup>141</sup> Paragraph 7 of Article 2 is for works which will be used by way of illustration. Educational exceptions are limited to classroom use, and materials have to be used inside a classroom. There is little to no mention of distance learning in the Berne Convention, TRIPs Agreement or WCT.<sup>142</sup>

It is submitted that this pressing need could be addressed through the reform of the compulsory licensing provisions in the Berne Appendix, in order to provide access to educational materials for development.<sup>143</sup>

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<sup>138</sup> Berne Convention for the Protection of Literary and Artistic Works (9 September 1886) [Berne Convention 1886] in Berne Convention Centenary (WIPO, 1986)

<sup>139</sup> Berne Convention app. art. IV(4), supra note 4; see also 2 RICKETSON & GINSBURG, supra note 100, § 14.95, at 949 (“It follows from these territorial restrictions that a licensee will be excluded from having his translation or reproduction printed outside the territory of the country which has granted the license.”)

<sup>140</sup> Article 3 of Berne appendix paragraph (a) and (b)

<sup>141</sup> Article 2 paragraph 1 and Article 3 7(a) and 9(b) of the appendix

<sup>142</sup> Collette Caine, Director, Consumer Inst. S. Afr., Presentation at the Transatlantic Consumer Dialogue Workshop on Global Access to Essential Learning Tools 4-5 (Apr. 5, 2004) summary available at [http://www.tacd.org/db\\_files/files/files355-filetag.doc](http://www.tacd.org/db_files/files/files355-filetag.doc)

<sup>143</sup> Otunba Olayinka M. Lawal-Solarin, CEO Literamed Publishing, Nigeria, Remarks at Blogging WIPO: Information Meeting on Educational Content and Copyright in the Digital Age (Nov. 21, 2005).

The Appendix must be reformed to reflect changing circumstances in developing countries and also to facilitate a more expedient process for utilising compulsory licensing to gain bulk access.

There is an unjust distributional mechanism for textbook dissemination – which raises the question: what are the possible alternatives? Some solutions may lie in the area of specific exceptions and limitations in domestic laws that may provide a balance. In South Africa this would be attained through fair dealing. Or it can be potentially through the use of bilateral, regional, or even multilateral agreements. In addition, from a distributive justice standpoint, fair use is a choice in favour of access to knowledge which more extensively recognises the rights of the public. In terms of Article 10 (2) of the Berne Convention, with regard to the so-called illustrations for teaching provides that:<sup>144</sup>

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.<sup>145</sup>

In developing countries like South Africa, a substantive equality principle would propose the maximum expansion of the Berne-endorsed exception whenever possible. It is submitted that South Africa has to domestically enact far-reaching exceptions, including an illustration for teaching purposes, which may begin to create mechanisms for access to works, for educational purposes.

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<sup>144</sup> Berne Convention for the Protection of Literary and Artistic Works (9 September 1886) [Berne Convention 1886] in Berne Convention Centenary (WIPO, 1986)

<sup>145</sup> Berne Convention for the Protection of Literary and Artistic Works (9 September 1886) [Berne Convention 1886] in Berne Convention Centenary (WIPO, 1986).

There are no quantitative limitations contained in Article 10(1), of the Berne Convention<sup>146</sup> apart from the general qualification that the utilisation of works should only be “to the extent justified by the purpose, by way of illustration for teaching, provided that such utilization is compatible with fair practice.”<sup>147</sup>

Teaching refers to the work of a teacher who determines the learning process of the student.<sup>148</sup> Thus, this section 10(2) of the Berne Convention does not fully encompass the act of the student that is undertaken during the educational process but rather the actions of the teacher. In distance learning where there is no teacher present, what are the limitations and exceptions set out for the administration of educational material on a digital platform?

These references to purpose and fair practice are similar to those in Article 10(1) of the Berne Convention,<sup>149</sup> and make the provision more open-ended, implying no necessary quantitative limitations. The words “by way of illustration” impose some limitation, but would not exclude the use of a whole piece of a work, in its entity.

Therefore, developing countries need to enact international exhaustion rules that would facilitate parallel importation of educational materials, which would be both Berne and TRIPS-compliant. These various approaches could provide an important point of access to educational materials from developed countries without the onerous licensing and equitable remuneration requirements of the Berne Appendix.

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<sup>146</sup> Berne Convention for the Protection of Literary and Artistic Works (9 September 1886) [Berne Convention 1886] in Berne Convention Centenary (WIPO, 1986).

<sup>147</sup> SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS : THE BERNE CONVENTION AND BEYOND 19-23 (Oxford Univ. Press, 2006)

<sup>148</sup> Bang J, Baumeister H-P, and Wilson K. (1999): Collaboration as a Challenge, New Learning Environments embedded in old Traditions, in *Proceedings from EUNIS .99, Information Technology Shaping European Universities*, Helsinki

<sup>149</sup> Berne Convention for the Protection of Literary and Artistic Works (9 September 1886) [Berne Convention 1886] in Berne Convention Centenary (WIPO, 1986).

### 3.4 TRIPS Agreement

The Trade-Related Intellectual Property (TRIPS) Agreement was enacted in 1994. It is the first comprehensive agreement to establish minimum, enforceable standards for the protection of Intellectual Property Rights (IPRs), hence a significant step in harmonizing national Intellectual Property (IP) systems.<sup>150</sup>

It should be noted that article 18(6) of this Agreement applies the same limitations or exceptions to related rights provided for in the Rome Convention.

Furthermore, article 13 of the TRIPS Agreement, which establishes the Three-step Tests, appears to be applicable only to limitations or exceptions to copyright, and not those relating to related rights.<sup>151</sup> Indeed, article 13 is preceded by provisions that refer to copyright, and it is only from article 14 onwards that the protection of performers, producers of phonograms and broadcasting organisations is developed. Second, there is a specific provision relating to limitations or exceptions to related rights in the above-mentioned article 18(6) of the Agreement, while article 13 refers to the normal exploitation of “the work”, but does not mention artistic performances, phonograms or broadcast programmes in this regard. As a result, under the TRIPS Agreement the Three-step Tests would not be required in terms of limitations or exceptions to related rights.

Hence, the TRIPS Agreement is one of the most comprehensive documents available for intellectual property, which focuses on the gaps in copyright protection as well as reduction in distortions and impediments to international trade.<sup>152</sup>

The TRIPs Agreement was required to reduce distortions and impediments to international trade, taking into account the need to promote effective and adequate protection of IPR, and to ensure the measures and procedures needed to enforce IPR. IPR should not become an obstruction to legitimate trade.

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<sup>150</sup> Cecilia Oh, US Opposed to Moves to Address Public-Health Concerns About TRIPS, at [http://www.twinside.org.sg/title1/3tw1\\_fr.htm](http://www.twinside.org.sg/title1/3tw1_fr.htm)

<sup>151</sup> Article 13 TRIPS Agreement

<sup>152</sup> LL.M. 81, 108 (1994) [hereinafter TRIPS Agreement], available at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.ht](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.ht)

### 3.4.1 Major characteristics of TRIPS Agreement

In terms of article 7 of TRIPS, the objectives of the TRIPS provides that

*“The protection and enforcement of intellectual property rights should contribute to the motion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”.*<sup>153</sup>

It is clear from the wording of the article that copyright protection is justified in so far as it achieves the goal of social and economic welfare. Article 8(1) then provides that a member state may in formulating or amending their laws and regulations, adopt necessary measures to protect and promote public interest in sectors of importance to socio-economic development and technological development.<sup>154</sup> TRIPS must be interpreted in light of its objective and purpose so that it is necessary to weigh the benefits to the author and balance it with the interests of access to educational material through the use of distance learning.<sup>155</sup>

Although according to TRIPS Agreement, article 1 obliges members to give effect to its provisions, members may, but are not be obliged to implement in their law more extensive protection than is required by the TRIPS Agreement, provided that such protection does not contravene the provisions of the TRIPS Agreement.<sup>156</sup> Members shall be free to determine the appropriate method of implementing the provisions of the TRIPS Agreement within their own legal system and practice. In terms of article 1(1) of the TRIPS Agreement Members are obligated to ‘give effect’ to provisions of the Agreement. It also provides that Members “shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.”<sup>157</sup>

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<sup>153</sup> TRIPs Agreement article 7

<sup>154</sup> TRIPS preamble

<sup>155</sup> Access to knowledge May 2005 available at [www.cptech.org/a2k?a2k\\_treaty\\_may9.pdf](http://www.cptech.org/a2k?a2k_treaty_may9.pdf)

<sup>156</sup> Article 1 of TRIPs Agreement

<sup>157</sup> Article 1(1) of the TRIPS Agreement

Article 1(1) provides flexibility for Members to implement the TRIPS Agreement in the manner of their own choosing, provided that the specific requirements of the Agreement are met.<sup>158</sup> These flexibilities within the TRIPs Agreement provide countries with the opportunity to adapt their Copyright laws to suit the law of the land. Article 1(1) is an important Article that could address the lack of provisions for distance learning. This is an extremely important principle for the purposes of dispute settlement because the implementation in national legal systems involves choosing between different approaches.

Article 2 of the TRIPS Agreement generally defines the relationship with the WIPO Conventions.<sup>159</sup> It requires Members to comply with the relevant provisions of the Conventions, and also provides that nothing in the TRIPS Agreement will be deemed to derogate from the obligations of parties to the Agreement. Therefore Article 2 of the TRIPs Agreement aims to harmonise the different international legislation.

On the basis of the TRIPS Agreement, it is submitted that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.<sup>160</sup> In addition, according to Article 7 of the TRIPS Agreement the protection and enforcement of intellectual property rights must contribute to the promotion of technological innovation and to the transfer and dissemination of technology and could be utilised to facilitate the use of works during distance learning, thereby enhancing the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.<sup>161</sup>

According to article 8 of the TRIPS Agreement, members may formulate or amend their laws and regulations, and in doing so, adopt the necessary measures required to protect public health and nutrition, and to promote the public interest in sectors of

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<sup>158</sup> Article 1(1) of TRIPS Agreement

<sup>159</sup> Article 2 of the TRIPS Agreement

<sup>160</sup> R. Xalabarder, Copyright and digital distance education: The use of pre-existing works in distance education through the internet, Columbia journal of law and arts 101 (2003)vol 26, p 156

<sup>161</sup> Article 7 of TRIPS Agreement

vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.<sup>162</sup> It is submitted that appropriate measures must be provided to that effect, provided these are consistent with the provisions of the TRIPS Agreement to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Article 8 of the TRIPS Agreement provides for measures to protect the public health nutrition and overall public interest that affect sectors which are of vital importance to their socio-economic and technological development.<sup>163</sup> These appropriate measures should be taken to ensure that public interest is taken into account.<sup>164</sup> It should be noted that the TRIPS Agreement seeks to prevent the abuse of rights by the rights holder which confine trade or negatively affect the technology transfer. In addition, the essence of TRIPS is that it identifies protected subject-matter and defines the rights granted.

In terms of TRIPS Agreement, Article 9 thereof directly relates to the Berne Convention<sup>165</sup> whereby all Members shall comply with Articles 1 through 21 of the Berne Convention (1971) as well as the Berne Appendix. However, Members shall not have rights or obligations under the TRIPS Agreement in respect of the rights conferred under article 6 bis of that Convention or the rights derived from therein. As a result, of the integration, the substantive rules of the Berne Convention, including the provisions of article 11 bis (1) (iii) and article 11(1)(ii) became an integral part of the TRIPS Agreement.

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<sup>162</sup> Article 8 of TRIPS Agreement

<sup>163</sup> Xalabarder, Copyright and digital distance education: The use of pre-existing works in distance education through the internet, Columbia journal of law and arts 101 (2003)vol 26. Pg 156

<sup>164</sup> Article 8 of the TRIPS

<sup>165</sup> Article 9 of the TRIPS

### 3.4.2 Limitations and Exceptions

The limitations and exceptions are carefully reiterated in article 13 of TRIPS, which is confined to the exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder. Distance learning is a form of education that is accessible even to those from poor social economic statuses.<sup>166</sup> Furthermore, article 8(2) of TRIPS states that appropriate measures should be taken. This should facilitate access to educational material for distance learners as a developmental need in order to increase access to educational material.<sup>167</sup>

Article 13 of TRIPS provides for the Three-step Tests, although it is worded slightly differently to the Berne Convention. However, the broad application of the three-step tests may restrict the rights of the author, which is contrary to Article 20 of the Berne Convention.<sup>168</sup>

Article 13 of TRIPS confers copyright protection in a work or other subject matter that is not infringed by the use of a work or subject matter, if the conditions pertaining to the amount of work used is the use of the work in a special case.<sup>169</sup> However, no specific guideline is administered with regards to what would be deemed special use in a distance learning setting. It should be noted that the use does not conflict with a normal exploitation of the work or other subject matter and the use does not unreasonably prejudice the legitimate interests of the copyright owner.<sup>170</sup> In relation to educational uses, the use must be made by or on behalf of a body administering an educational institution, made for the purpose of giving educational instruction, which should be inclusive of distance learning education.<sup>171</sup> It is important to note that the use of the work does not include commercial advantage or profit.

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<sup>166</sup> G. Hinze, Making knowledge available across borders: The case of mandatory minimum international copyright and limitations for education, capacity building and development (EFF, Oct 2008)

<sup>167</sup> Lawrence Liang, Exceptions and limitations in Indian Copyright law for education: An assessment. The Law and Development Review, Special issue (2010): Vol (3) Issue 2, Article 7.

<sup>168</sup> Article 20 of Berne Convention

<sup>169</sup> Article 13 of TRIPS Agreement

<sup>170</sup> S. Ricketson, the law of intellectual property: copyright, designs & confidential information (2nd ed, 1999) at § 11.109

<sup>171</sup> S. Ricketson, the law of intellectual property: copyright, designs & confidential information (2nd ed, 1999) at § 11.109

Many countries can easily formulate their educational exceptions based on the three-step tests process <sup>172</sup> on the basis of article 9 (2) of the Berne Convention, article 13 of the TRIPs agreement and also article 10 of the WCT and article 16 of the WPPT.

Article 13 of TRIPS confers copyright protection in a work or other subject matter that is not infringed by the use of a work or subject-matter. If the condition pertaining to the amount of work used is the use of the work as a special case, the use does not conflict with normal exploitation of the work or other subject matter and the use does not unreasonably prejudice the legitimate interests of the copyright owner.<sup>173</sup>

In relation to educational uses, the use must be made by or on behalf of a body administering an educational institution, made for the purpose of giving educational instruction, which should be inclusive of distance learning education.<sup>174</sup> It is important though that the use of the work does not include commercial advantage or profit.

It is therefore evident that countries can easily formulate their educational exceptions based on the Three-step Tests<sup>175</sup> as propounded in article 9(2) of the Berne Convention, article 13 of the TRIPs agreement and also present in article 10 of the WCT and article 16 of the WPPT.

The test requires that the exceptions be confined to “*certain special cases*” that “do not *conflict with the normal exploitation* of the work” and “do not *unreasonably prejudice the legitimate interests* of the author”.

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<sup>172</sup> Examples of this approach can be found in Bhutan Copyright Act, s. 27; U.K. Copyright Act 1956, s. 16(6) (Kiribati, Tuvalu); Korean Copyright Act, Art. 87; Samoan Copyright Act, s. 24(d), Tongan Copyright Act, s. 26(d).

<sup>173</sup> -S. Ricketson, the law of intellectual property: copyright, designs & confidential information (2nd ed, 1999) at § 11.109

<sup>174</sup> S. Ricketson, the law of intellectual property: copyright, designs & confidential information (2nd ed, 1999) at § 11.109

<sup>175</sup> Examples of this approach can be found in Bhutan Copyright Act, s. 27; U.K. Copyright Act 1956, s. 16(6) (Kiribati, Tuvalu); Korean Copyright Act, Art. 87; Samoan Copyright Act, s. 24(d), Tongan Copyright Act, s. 26(d).

Therefore, there is an emergent acceptance of the Three-step Tests, as the *de rigueur* for exceptions and limitations that encompass educational activities and the digitisation of educational material to improve access to educational material through distance learning.<sup>176</sup> TRIPS article 13 stretches the test one step further and applies to all economic rights, assured by TRIPS as minimum standards. These rights include not only the recently recognised right of rental as purported in article 11 of TRIPS, but also the panoply of rights of the Berne Convention as incorporated into TRIPS (TRIPS article 9 (1)).<sup>177</sup> What is important is that article 13 of TRIPS does not only express limitations but also to the “minor reservations” implied in the Berne Convention.

Article 8(2) of the Berne Convention recognises the vast potential that intellectual property rights can challenge the welfare benefits of a competitive domestic market.<sup>178</sup> Consistent corrective measures should be put into place and should be aligned with the obligations to protect rights.

This requirement suggests only a narrow scope of discretion available for correcting identified abuse and other destabilising behaviour. Consequently, some commentators suggest that article 8(2) simply reflects an overarching context within which other provisions in TRIPS dealing with competition law concerns can be evaluated, such as TRIPS article 40.<sup>179</sup> It is submitted that article 40 must be appraised relative to the domestic laws because it is very difficult to determine what is abusive and is context-specific. Thus, article 40 of TRIPS seems to consider a case-by-case assessment, of particular practices as opposed to a broad solution, to deal with systemic access challenges especially for educational material. The Appendix intentions to deal with bulk access may arguably be the only legitimate avenue to *repeatedly* and *consistently* secure bulk access especially in developing countries. Article 40 of TRIPS can facilitate the address of broad market undersupply or unreasonably high prices due to a lack of domestic competition.

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<sup>176</sup> Examples of this approach can be found in the Philippines Intellectual Property Code, s. 212; Samoan Copyright Act, s. 24(c). Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 *Yale L.J.* 1575, 1581 (2002) (“Intellectual property rights, if made too strong, may impede innovation and conflict with other economic and policy objectives.”)

<sup>177</sup> US – Section 110(5) Report, *supra* n. 46, §6.80.

<sup>178</sup> Article 8 (2) of TRIPS

<sup>179</sup> Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (1998)

One court has noted that “it is copyright misuse to exact a fee for the use of a musical work which is already in the public domain.”<sup>180</sup> While copyright misuse is not explicitly addressed in international copyright treaties, TRIPS Articles 8 (2) and 40 seeks to preserve the underlying public policy goals and frustrate the right holders copyright practices discourage the welfare objectives of copyright to promote economic gain of the author, which vastly affect the technology dissemination which is the predominant delivery mode for educational material in distance learning.

In a digital era, the welfares of developing countries are similar to the consumers in developed countries. For this there is distinguished paradigm shift negotiating international copyright agreements. There have been notable increases in non-governmental organizations, private corporations and other non-state entities which have participated in alliance-building with developing countries to limit the hostile extension of proprietary interests in information works and other copyrighted objects. Thus, the digital age impels a greater demand for the development of a robust public interest ideology to balance the rights of owners and users, and to preserve the basic building blocks of future innovation and creativity.<sup>181</sup> For developing countries, there is some discretion to view limitations and exceptions as essential features of the public interest in copyright, so long as the limitations and exceptions are arguably within the ambit of the framework established by the Berne Convention. In the digital context, then, what is important is to extend these limitations and exceptions specifically to works regardless of their protection. The important question is, what should copyright’s public purposes be in the digital age, and how should implementation of the purpose be carried out in a way that benefits the author/creator and the end user to effectively orchestrate the use, dissemination of educational material for distance learners.

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<sup>180</sup> F.E.L. Publ’ns, Ltd. v. Catholic Bishop, 214 U.S.P.Q. (BNA) 409, 413 n.9 (7<sup>th</sup> Cir. 1982)

<sup>181</sup> Laurence Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Law making*, 29 Yale J. Int’l L. 1, 6 (2004) (noting that developing countries have begun “moving to regimes whose institutions, actors, and decision-making procedures are more conducive to achieving desired policy outcomes, relieving pressure by domestic interest groups for law making in other regimes, generating counter regime intellectual property norms in tension with TRIPS, and developing concrete proposals to be integrated into the WTO and WIPO. Intellectual property issues are now at or near the top of the agenda in intergovernmental organisations such as the World Health Organisation and the Food and Agriculture Organisation, in international negotiating fora such as the Convention on Biological Diversity’s Conference of the Parties and the Commission on Genetic Resources for Food and Agriculture, and in expert and political bodies such as the United Nations Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights”)

### 3.5 WCT accommodates the internet

The 1996 WIPO Copyright Treaty (WCT)<sup>182</sup> has two distinct references for balancing the rights of authors and end users. Including one in the preamble, which refers back to the Berne Convention, which provides that: “Recognising the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention?”<sup>183</sup>

The statement made in the WCT also incorporates the Three-step Tests as an exception and limitation in the WCT, but it was agreed that any information in the WCT should not take away nor extend from the three step tests mentioned in the Berne Convention.<sup>184</sup> The Three-step Test was not intended to add another limitation on the exceptions. However, this argument can be countered by the lack of clarity of the Three-step Tests.<sup>185</sup>

There are restrictions in place that limit the use of copyright protected material on the internet which is at odds with the established practice of non-commercial dissemination.<sup>186</sup>

Many educators, who utilise the benefits of the internet, have started highlighting the lack of clarity or technological adaptability to the current limitations and exceptions set in the Berne Convention. It is submitted that an empirical study of limitations and exceptions should be put in place in the various national legal systems to provide an interesting mosaic of exceptions, which are expressed in ways that are very specific while others are there essentially to provide criteria and guidance to courts called upon to decide whether particular use of the work is infringing.

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<sup>182</sup> WIPO Copyright Treaty (20 December 1996), [http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html), (accessed on 18 August 2013)

<sup>183</sup> WIPO Copyright Treaty (20 December 1996), <[http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html); (accessed on 18 August 2013).

<sup>184</sup> WIPO Copyright Treaty, adopted by the Diplomatic Conference on 20 December 1996, <<http://www.wipo.int/treaties/en/ip/wct/statements.html>; (accessed on 18 August 2013).

<sup>185</sup> WIPO, “Implications of the TRIPS Agreement on Treaties Administered by WIPO

<sup>186</sup> Copyright Act, (1709) 8 Anne c. 19, <<http://www.copyrighthistory.com/anne.html>> [Statute of Anne].

From an economic perspective, the protection needs to be sufficient to generate new works and ensure optimal (not necessarily maximal) commercial dissemination (where applicable) without endangering the creation of new works or generating unreasonable welfare costs. Thus, protection is required to achieve the objective of generating robust copyright industries and well-functioning markets for informational and ideational objects, including public information and entertainment.

With the advent of the 'Information Age', many countries struggled to usher copyright law into the digital era. However, in 1996 this problem was addressed by the World Intellectual Property Organization (WIPO), later adopted by the WIPO Copyright Treaty (WCT). The WCT came into force on 6 March 2002 with over 100 countries having successfully joined.

It endeavoured "to respond adequately to the challenges posed by digital technology and copyright law pertinently encapsulated by the internet".<sup>187</sup> The use of anti-circumvention measures by copyright owners of exclusive rights adversely impacts the exceptions and limitations provided for in TRIPS Agreement and the Berne Convention. These exceptions and limitations tolerate public use of copyrighted works, without permission in certain cases.<sup>188</sup>

The WIPO Copyright Treaty 1996 was implemented to cater for the ever-changing technological environment. The WCT protects literary and artistic works such as books, computer programs, music, photography, paintings, sculpture and films.<sup>189</sup> The treaty increases the control of each national state and in doing so, returns the power to the states as signatories to the Treaty.

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<sup>187</sup> S. Morolong, Copyright in the Digital Environment : An Assessment of the Botswana Copyright and Neighbouring Rights Act of 2000, University of Botswana Law Journal, Vol 17 Issue 3, 2006, p. 19

<sup>188</sup> T. Pistorius, Developing Countries and Copyright in the Information Age, p. 11 states that : "Technological protection measures do not distinguish between uses which are not authorised by the owner, but permitted in law (fair dealing) and uses which are not authorised by the owner, but which are also infringing".

<sup>189</sup> Ginsburg, Jane. "Copyright Legislation for the "Digital Millennium", Columbia VLA Journal of Law and the Arts, 23 Colum.-VLA J.L. & Arts 137, spring, 1999.

The scope of the owner's rights and that of the public's rights are defined. It is important to note that the Treaty safeguards the rights of the copyright owner adequately and effectively, but still ensures the public utility.<sup>190</sup>

The Treaty requires countries to provide the rights themselves, but subject to two types of technological adjuncts to the rights.<sup>191</sup> It is submitted that firstly, the 'anti-circumvention' provision confronts the problem of 'hacking', which necessitates all countries to provide adequate legal protection and effective remedies against the circumvention of technological measures (such as encryption), used by rights holders to adequately protect their rights when their creations are disseminated on the internet.<sup>192</sup> Secondly, the type of technological adjunct safeguards the reliability and integrity of the online marketplace by requiring countries to prohibit the deliberate alteration or deletion of electronic 'rights management information'.<sup>193</sup>

Prior to the 1996 WIPO Treaty, the right of authors, performers and 'phonogram producers' to authorise or prohibit copying of their works and other protected material has been a longstanding feature of international instruments in the copyright field. It has been addressed in the Berne Convention (1971), Rome Convention (1961), Geneva Phonograms Convention (1971), WTO TRIPs Agreement (1994) and in the WIPO Copyright Treaty (1996).<sup>194</sup>

However, a major milestone for the 1996 WIPO Treaties was to clarify and confirm the broad scope of the reproduction rights, particularly in its application to works and phonograms in the digital environment. Both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) re-state the Berne Convention requirement that the reproduction right must cover reproductions in 'any manner or form'.<sup>195</sup>

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<sup>190</sup> Ginsburg, Jane. "Copyright Legislation for the "Digital Millennium", Columbia VLA Journal of Law and the Arts, 23 Colum.-VLA J.L. & Arts 137, spring, 1999

<sup>191</sup> "La era digital y las excepciones y limitaciones al derecho de autor". Universidad Externado de Colombia, Bogotá. First edition, p. 222

<sup>192</sup> Rodriguez Moreno, Sofia. "La era digital y las excepciones y limitaciones al derecho de autor". Universidad Externado de Colombia, Bogotá. First edition, p. 222.

<sup>193</sup> wipo.mail@wipo.int); (accessed on 25 August 2013).

<sup>194</sup> Wipo, study on the limitations and exceptions to copyright and related rights for the purposes of educational and research activities in Latin America and the Caribbean, 19<sup>th</sup> session, 2009

<sup>195</sup> www.ifpi.org; (accessed on 25 August 2013).

### 3.5.1 What is the scope and nature of the WCT?

In terms of article 1 of the WCT countries should create adequate provisions for copyright law that promote access as well as anti-circumvention measures. The first sentence of article 1(1) of the WCT provides that:

*“This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention.” Article 20 of the Berne Convention contains the following provision: “The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention.”<sup>196</sup>*

It is submitted that article 1(1) of World Copyright Treaty (WCT); reinstates the Berne Convention with regards to artistic, literary works. According to article 1(1) of the WCT, it is clear that there is no interpretation of the WCT that goes contrary to the level of protection provided in the Berne Convention.<sup>197</sup> This statement is further reinstated in article 1(4) of the WCT, which provides full utterance to the fact that the Berne Convention cannot be contravened.

It is also provided that contracting Parties to the Berne Convention shall comply with articles 1 to 21 as well as the Appendix of the Berne Convention. The main objective of the Three-step Test is to extend it to the digital arena, thus increasing its flexibility for the digital milieu.<sup>198</sup>

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<sup>196</sup> Article 1(1) of the WCT

<sup>197</sup> WIPO, study on the limitations and exceptions to copyright and related rights for the purposes of educational and research activities in Latin America and the Caribbean, 19th session, 2009

<sup>198</sup> Article 1(4) reads: The reproduction right, as set out in article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of article 9 of the Berne Convention

It is also argued that any member countries of WIPO, irrespective of whether or not they are party to the Berne Convention, must adhere to the Treaty. Hence, the second sentence of article 1(1) of the WCT deals with the question of the relationship.<sup>199</sup>

Article 1(2) of the WCT contains a safeguard clause which is similar to that found in the TRIPs Agreement.<sup>200</sup> *“Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.”*

Article 2 of the WCT clarifies that “Copyright protection extends to the expression of the idea and not to the idea itself, procedures, and methods of operation or mathematical concepts as such”.<sup>201</sup> This clarification is also included in article 9 of the TRIPs Agreement and Article 2 of the Berne Convention.

Additionally article 3 of the WCT focuses on adherence and the implications undertaken by the member states.<sup>202</sup> The rights of the member state should be enjoyed in the country of origin before being enjoyed in any other countries. As a result it is important to note that the criteria for eligibility must be met; such as synonymous to that which is found in the Berne Convention. Furthermore, article 3 of the WCT, dealt with above, also prescribes the *mutatis mutandis* application of articles 2 and 2bis of the Berne Convention.<sup>203</sup> The scope of the subject matter covered by copyright, particularly in relation to computer programs and databases, was explored in the WCT. It is noteworthy that the WCT shares the same concept of literary and artistic works as is found in the Berne Convention.

The scope of rights are addressed in article 6 (1) of the WCT, which provides for exclusive right to the owner, to authorise and make available to the public, originals and copies of works, through sale or transfer of ownership, which is, an exclusive right of distribution.<sup>204</sup> Under the Berne Convention, it is only in respect of cinematographic works that such a right is granted explicitly. It should be noted that

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<sup>199</sup> Article 1 (1) of WCT

<sup>200</sup> Article 1(2) of WCT

<sup>201</sup> Article 2 of the WCT

<sup>202</sup> Article 3 of the WCT

<sup>203</sup> WIPO, study on the limitations and exceptions to copyright and related rights for the purposes of educational and research activities in Latin America and the Caribbean, 19th session, 2009

<sup>204</sup> Article 6(1) of the WCT

article 6 (1) of the WCT is a useful clarification of the obligations presented in the Berne Convention (and also under the TRIPS Agreement, which includes by reference the relevant provisions of the Convention).

In terms of article 7 of the WCT provision is made for an exclusive right of authorising commercial rental to the public in respect of the same categories of works — computer programs, cinematographic works and works embodied in phonograms, as determined in the national laws of Contracting Parties. Thus, equally similar to those covered by articles 11 and 14(4) of the TRIPS Agreement, and with the same exceptions. The exceptions are in respect of computer programs which are not themselves essential objects of the rental, in respect of cinematographic works unless commercial rental leads to widespread copying of such works, materially impairing the exclusive right of reproduction. Article 11 of WCT requires all parties to have sufficient legal protection and good remedies for anti-circumvention.<sup>205</sup>

For this reason digital transmissions are neutrally described, the description is not extremely technical but at the same time it conveys the interactive nature of digital transmissions, there is appropriate liberty left for national legislation; that, in respect of legal characterisation of the exclusive right — that is, in respect of the actual choice of the right or rights to be applied and in doing so addressing some of the gaps in the Berne Convention in the coverage of the relevant rights (the right of communication to the public and the right of distribution) should be covered.

Although copyright laws have traditionally included exceptions in favour of illustration for teaching, the development of digital distance education is generating new requirement to be dealt with in terms of the availability of educational resources that can be used by teachers and students in this environment. The use of network-based learning accounts at present for a significant part of regular curricular activities. While dissemination of study materials through online networks can have a beneficial effect on the quality of European education and research, it may also carry

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205 Article 11 of WCT

a risk of copyright infringement where the digitisation and/or making available of copies of research and study materials are covered by copyright”<sup>206</sup>

The rise in distance education through digital networks is not only due to the opportunity to learn across geographical barriers and without the need to adhere to a timetable as in face-to-face education, but the results also show that students who receive some or all of their education online perform on average better than those who attend only traditional face-to-face classes.<sup>207</sup> These are the findings of experts from the United States Department of Education, which analysed 99 studies carried out in the country between 1996 and 2008.

### **3.5.2 Limitations and exceptions in the digital environment**

It is understood that the provisions of article 10 [of the WCT] permits contracting parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Article 10 states the following:<sup>208</sup>

*(1) “Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author; (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”<sup>209</sup>*

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<sup>206</sup> Commission of the European Communities. Green Paper on Copyright in the Knowledge Economy. Brussels, 2008.

<sup>207</sup> Commission of the European Communities. Green Paper on Copyright in the Knowledge Economy. Brussels, 2008.

<sup>208</sup> Article 10 of WCT

<sup>209</sup> Article 10 of the WCT

It is also important to note that the provisions are explicitly understood by contracting parties to take full advantage and develop exceptions and limitations that are suitable for that specific contracting party's need and to ensure that the provisions are suitable for the digital arena.<sup>210</sup> Article 10(2) [of the WCT] "neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention". It is obvious that all new exceptions and limitations will be subjected to the three step test. The provisions (all new exceptions and limitations developed by the contracting parties) should be subjected to the Three-step Test as stipulated 9(2)<sup>211</sup>. Article 10(1) of the WIPO extends the scope of the three-step test to the authors of literary and artistic works.

Article 10(2) of WCT raised several trepidations because it lacked any evident interest in restoring the balance between private and public interest. This treaty was contrary to what had already been written in article 20 of the Berne Convention, which was deemed unlawful.<sup>212</sup> Article 10(2) provides obligatory provisions that administer additional requirements be met in addition to the Three-step Test.<sup>213</sup>

A number of developed nations have modernised or begun updating their copyright laws in accordance with the WIPO treaties. The U.S, Australia and the European Union have enacted WCT-consistent legislation. In 2003 most EU member states had implemented a new copyright directive.<sup>214</sup> The implementation of the WCT will affect the future of equilibrium that has been so important to the copyright system and to information users in the past. The US Digital Millennium Copyright Act has been the most controversial in implementing the WCT. The US has added to the Copyright Act legal protection for technological copyright protection measures.<sup>215</sup>

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<sup>210</sup> Presentation made on 11 April 2003 at the Palais des Nations, Geneva, in the context of the Science and Technology Diplomacy Initiative and the UNCTAD-ICTSD Project on IPRs and Sustainable Development: Policy. Dialogue on a Proposal for an International Science and Technology Treaty. Full text available at: [http://www.ictsd.org/dlogue/docs/tech\\_transfer\\_dialogue.pdf](http://www.ictsd.org/dlogue/docs/tech_transfer_dialogue.pdf)

<sup>211</sup> Article 10(2) of the WCT reads:

Contracting Parties shall, when applying the Berne Convention, confine any limitations of

<sup>212</sup> [http://www.wipo.int/edocs/mdocs/diplconf/en/crn/dc/crn\\_dc\\_102.pdf](http://www.wipo.int/edocs/mdocs/diplconf/en/crn/dc/crn_dc_102.pdf);

<sup>213</sup> Article 10(2) of the WCT reads: (accessed on 25 August 2013).

Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

<sup>214</sup> [http://www.ifla.org/files/assets/clm/position\\_papers/ilp.pdf](http://www.ifla.org/files/assets/clm/position_papers/ilp.pdf); (accessed on 25 August 2013).

<sup>215</sup> Louise Moran. Distance Education and Copyright. UNESCO, Copyright Bulletin, April – June 1999, p. 13.

The DMCA updates copyright exceptions for the digital environment.<sup>216</sup> Section 1201 of the DMCA contains a 'savings' clause, which states that no new protection for copyright holders (such as the protection for technological copyright protection measures) affects any existing exceptions or limitations, including fair use. Section 404 of the DMCA also amends the existing exemption for non-profit libraries and archives in section 108 of the Copyright Act to accommodate digital technologies and evolving preservation practices.<sup>217</sup>

Technological advancement and access to electronic educational material have indisputably been allied with distance learning. There is an increased inclination towards distance learning in the past years and with this growth there is a beckoning need to improve the regulatory framework. A framework that should foster the idea that there is amplified creativity and innovation of a work through increasing accessibility, via heightened reproduction and dissemination of electronic educational material. The distance learning model is interactive and incorporates the aforementioned factors, which if realised and accomplished would be of public good to all distance learners. It can be submitted that the international instruments need to confront and frustrate the challenges that come with digitisation in distance learning, which will in turn cater for both the copyright holder and the learner.

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<sup>216</sup> [http://www.ifla.org/files/assets/clm/position\\_papers/ilp.pdf](http://www.ifla.org/files/assets/clm/position_papers/ilp.pdf); (accessed on 25 August 2013).

<sup>217</sup> Louise Moran. Distance Education and Copyright. UNESCO, Copyright Bulletin, April – June 1999, p. 13.

## Chapter 4: Fair dealing and Fair use

### 4.1. South African Copyright law

Fair dealing is an integral part of copyright law. It allows for the copying of a reproduction relative to the manner of use and quality. Fair dealing is an equitable instrument to allow use of certain literary works.<sup>218</sup> Fair dealing has imparted itself into use for SA and UK copyright framework. Fair dealing provisions are long and exhaustive and with this backdrop have been deemed restrictive.<sup>219</sup> Fair dealing allows for limited copying, without permission, for: private study; research; criticism; and news reporting. However such copies must adhere to the Three-step Test.

In contrast to fair dealing the fair use approach can for the criteria that must be met to fair use to subsist the list is not exhaustive and accentuates a more attractive, more flexible approach which has been adopted in the US.<sup>220</sup>

#### 4.1.1 General

In South Africa, the Copyright Act No. 98 of 1978 governs copyright-related matters. Section 41(4) of the SA Copyright Act expressly states that 'no copyright or right in the nature of copyright shall subsist only by virtue of the Copyright Act.'<sup>221</sup> Currently, under the Copyright Act literary, musical and artistic works, sound recordings, cinematograph films, broadcasts, program-carrying signals, published editions and computer programs are all protected.<sup>222</sup>

Section 23(1) deals with infringement, which is termed direct or primary infringement. The copying of a work itself can be copied; however, it can be deemed sufficient for infringement if a substantial part thereof is copied (section 1(2A)). Whether such a part has been copied is resolved by the extent or nature of the work copied from the copyrighted work and not by the significance of the part in relation to the perceived

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<sup>218</sup> 'Copyright: Over-Strength, Over-Regulated, Over-Rated (1996) E.I.P.R 18 (5) 253 at 259

<sup>219</sup> Wetherall, Kimberlee, Fair use and Fair dealing: The copyright exceptions Review and the future of copyright exceptions in Australia, Intellectual property research Institution, Occasional paper number, 2005, 310  
<sup>220</sup> Burrell, Robert, Reining in Copyright law: Is fair use the answer, Intellectual property Quarterly, 2001,361  
<sup>221</sup> Section 41 (4) Copyright Act No. 98 of 1978

<sup>222</sup> Section 2(1) of the South African Copyright Act.

infringing work.<sup>223</sup> The term ‘substantial’ is to be understood qualitatively rather than quantitatively.<sup>224</sup>

#### 4.2.1 Provisions

It is notable that specific acts are excluded from copyright protection. Basic exemptions are set out in section 12, which deals with literary or musical works. Section 12(1) provides that copyright would not be infringed by any fair dealing.

Fair dealing can be defined as a limitation or an exception to the exclusive right granted by copyright law to the owner of a creative work. The utilisation of a fair dealing (section 12) approach is prominent in many common law jurisdictions

Table 5: Provision in South African Copyright Act

Area of interest	Section
research and private study	sections 12(1)(a), 15(4), 18, 19A;
personal private use	sections 12(1)(a), 15(4), 18, 19A
criticism and review	sections 12(1)(b), 15(4), 16(1), 17, 18, 19A, 19B(1)
reporting current events, sections	12(1)(c), 15(4), 16(1), 17, 18, 19A, 19B

#### 4.3.1 Exceptions and limitation

In section 12(1) fair dealing applies directly to literary and musical works to be copied.

<sup>223</sup> Section 1 (2A) of the South African Copyright Act.

<sup>243</sup> See, for instance, Galego Publishers (Pty) Ltd v Erasmus

<sup>224</sup> See, for instance, Galego Publishers (Pty) Ltd v Erasmus [1989 (1) SA 276 (A)] and W Baude et al supra note 357 at 84. In essence, the substantiality requirement represents the equivalent to the de minimis requirement under U.S. law.

In addition, it applies to artistic works, cinematograph films, sound recordings, broadcasts, published editions and computer programs. It is noteworthy that the scope of fair dealing is diminished in relative or specific categories of works.

This means that any use of material that falls under this exception requires neither the permission of the copyright holder nor the payment of royalties.<sup>225</sup> This exception is generally understood to cover individual students or learners who make copies for themselves for the purposes of research or private study by the person using the work” is not an infringement of copyright. This section does not make room for the use of copies that are distributed online for distance learners, also the role of the educator in disseminating the copies for distance learners remains unclear.<sup>226</sup>

This means that any use of material that falls under this exception requires neither the permission of the copyright holder nor the payment of royalties. In section 12(1) (b) allows works to be copied for criticism. This may include critical review in a teaching and learning context.<sup>227</sup> All copying must be considered ‘fair’ in order to qualify for these exceptions. However, the word ‘fair’ is open to interpretation and is not well described – which raises the question of whether the critical review of a work undertaken online by a group of distance learners<sup>228</sup> during a discussion which would entail the mass copying and distribution to the relevant learners may be considered as fair under section 12(1) would be debatable.<sup>229</sup> The cumulative effect of the copies should not conflict with the normal use of the work, the legislator has not given the go ahead for the reproduction of large amounts of copies. In light of this there is not sufficient exceptions for the distribution of digitised learning materials in distance learning.

Section 12(3) of the Copyright Act allows for quoting from a copyright work. The copyright protection for a literary work or musical work which is lawfully available to the public shall not be infringed by any quotation.<sup>230</sup>

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<sup>225</sup> Report on the South African Open Copyright Review;  
<http://ip-unit.org/wp-content/uploads/2010/07/opencopyrightreport1.pdf>

<sup>226</sup> Report on the South African Open Copyright Review

<sup>227</sup> section 12(1) (b) ) Copyright Act No. 98 of 1978

<sup>228</sup> ICDL, International Centre for Distance Learning, The Open University, UK <http://icdl.open.ac.uk>

<sup>229</sup> section 12(1)

<sup>230</sup> Section 12(3) of the Copyright Act No. 98 of 1978

Any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: the author name should appear alongside the quotation. According to section 12(4) a literary or musical work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication. This section specifically authorises the use of a work for illustrative purposes in teaching. Unfortunately, the Act does not define 'illustration', there is also uncertainty as to whether teachers are covered. There is no mention in this section as to whether the illustration pertains to face to face learning, but again leaves very limited scope for distance learners.<sup>231</sup>

In section 13 of the Copyright Act, a work can be replicated if it is one copy of a reasonable portion of the work is made also the cumulative effect of the reproduction should not conflict with the normal use of the work to the unreasonable prejudice of the legal interests and residuary rights of the author.<sup>232</sup> Subject to the provisions of regulation 2, a single copy may be made by or for a teacher, at his request, for research, teaching or preparation for teaching in a class.<sup>233</sup> However, there will be a cumulative effect. The question raised is whether the cumulative effect would be considered infringement and whether the hosting of a document online for distance learners to access and copy for educational purposes institutes issues of what is considered reasonable exploitation of a work.

The limitations and exceptions for access to educational material for distance learning in South Africa has been inadequately addressed because there is no case law that interprets the use of copyright protected material in respect to access to learning materials for the poor.

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<sup>231</sup> Keegan, D. (3<sup>re</sup>\* ed) (1996) *Foundations of Distance Education*, London and New York, Routledge

<sup>232</sup> Section 13 of the Copyright Act No 98 of 1978

<sup>233</sup> Harry, K. (ed) (1999) *Higher Education through Open and Distance Learning*, World review of distance education and open learning: Volume 1, London and New York, Routledge and The Commonwealth of Learning

## 4.2. United Kingdom

### 4.2.1 General

In the UK the EU directive can also be implemented in conjunction to the fair dealing provisions. The limitations and exceptions of copyright are particularly dealt with in Part 1 Chapter 3 of the CDPA.<sup>234</sup> There are specific provisions mentioned in Part 1 Chapter 3<sup>235</sup> that refer to education and which are listed; unfortunately there is no specific mention of distance learning.

### 4.2.2 Provisions for education

Fair dealing provisions have been subjected of marked academic debate of whether there are principles because the Act contains very narrow purpose.<sup>236</sup>

**Table 5: Provisions for copyright in the UK**

<b>Area of interest</b>	<b>Section</b>
Things done for the purposes of instruction or examination	sec 32
Inclusion in anthologies for educational use	sec 33
Performing, playing or showing work in course of activities of educational establishment	sec 34
Recording by educational establishments of broadcasts	sec 35
Reprographic copying by educational establishments of passages from published works	sec 36;
Lending of copies by educational establishments	sec 36A

<sup>234</sup> Other important exceptions and limitations are contained in sections 79 and 81 CDPA regarding Certain moral rights. Furthermore, sec 16 CDPA contains an exception and limitation for ‘insubstantial’ uses. A similar list of exceptions and limitations regarding the rights in performances is contained in schedule 2 to the CDPA. For other defences to a claim of copyright infringement, including a public interest defence which is based on sec 171(3) CDPA, see K Garnett supra note 215 para 22-50 et seq.

<sup>235</sup> Chapter III is entitled ‘Acts Permitted in Relation to Copyright Works’ [sections 28-76 CDPA]

<sup>236</sup> Kevin Garnett et al., Copinger and Skone James on Copyright, 15th ed. (London: Sweet & Maxwell, 2005)

### 4.2.3 Exceptions and Limitations

The CDPA currently provides exceptions for the use of works for education in sections 32 to 36, with sections 33 to 36 applying to educational establishments only.

In section 28 of the CDPA specifies the exempted temporary copy as one “which is transient or incidental, which is an integral and an essential part of a technological process, and the sole purpose of which is to enable – (a) a transmission of the work in a network between third parties by an intermediary; or (b) a lawful use of the work; and which has no independent economic significance.”<sup>237</sup>

There are also fair dealing exceptions in sections 29 and 30 of the CDPA.<sup>238</sup> Against the back drop of section 28 it would be considered within the exceptions of the CDPA that the downloading and storage of educational material may be permitted as long as it is transient.

In section 29(1) fair dealing subsists for literary, dramatic, musical, artistic work for the purpose of non-commercial research that does not infringe the CDPA.<sup>239</sup> There must be sufficient protection with emphasis on the word ‘sufficient’ which could be interpreted differently across the board.

Section 29(3) (2) accords that fair dealing with typographical arrangement of a published addition for the purpose of research /private use is permitted.<sup>240</sup> The words ‘research’ or ‘study’ are not defined in the Act and it would be important that academics and researchers understand what is being referred to and whether the provision is broad enough to extrapolate to distance learning.

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<sup>237</sup> See also Article 21 §3 Belgian Copyright Act, Article 81 Croatian Copyright Act, §44a German Copyright Act, Article 28 B Greek Copyright Act.

<sup>238</sup> A fair dealing other than private study requires, subject to exemptions, a sufficient acknowledgement identifying the work in question by its title or other description, and identifying the author

<sup>239</sup> Section 29(1) of CDPA

<sup>240</sup> Section 29(3)(2) of CDPA of 1988

There is no general limitation or exception for private copying in UK copyright law, there is no private copy levy system. There are, rather, a few narrowly phrased exceptions that deal with private copying.<sup>241</sup>

The other topics that are covered are specific activities that do not obtain any non-commercial gain such as research and private study<sup>242</sup>.

In section 30 of the UK CDPA there is no specific mention of the *right of making available* or the right of public communication, has been introduced in respect of digital networks.<sup>243</sup> In general, existing provisions on limitations, for educational uses, have not been amended with a view to digital uses and have not been extrapolated as to apply to electronic reproductions. In the absence of copyright exceptions for the right to copy or use a work requires the necessary clearance from the rights holder, which can take an extensive amount of time.<sup>244</sup>

Evidence suggests from a conducted survey that; a) 90% of respondents had to chase rights holders for permission, and the typical number of items chased per institution per annum amounted to 97; b) 12.5 % of requests for permission to use material were never answered; and c) fees of up to £7.55 per article were charged

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<sup>241</sup> A Gowers. In January 2008, the UK Intellectual Property Office issued a follow-up document entitled Taking forward the Gowers review of intellectual property – proposed changes to copyright exceptions (available at <http://www.ipso.gov.uk/consult-copyrightexceptions.pdf> [accessed on 25 October 2014]) makes suggestions and raises questions as a basis for further discussions

<sup>242</sup> Section 29 Copyright, Designs and Patents Act 1988 (CDPA)

<sup>243</sup> section 30 of the UK CDPA of 1988

<sup>244</sup> See, for instance, guidelines issued by the Cardiff University Copyright – ‘Fair Dealing’ Guidelines (2006) available at

<http://www.cardiff.ac.uk/insrv/resources/guides/copyright/inf036%20Fair%20Dealing%20Guidelines.pdf> [accessed on 25 January 2014]. According to these guidelines, the following limits for fair dealing copying are generally accepted: (1) one complete chapter from a book or 5% of the total, whichever is the greater; (2) one article from a journal issue or set of conference proceedings; (3) one short story or poem (up to a maximum of 10 pages) from an anthology; (4) one illustration, diagram or map not exceeding A4 size (illustrations forming an integral part of a chapter or article may be included in the above extracts); (5) up to 10% from a pamphlet, report or standard (up to a maximum of 20 pages); and (6) a short excerpt from a musical work, provided it is not for performance Purposes. See also Joint Information Systems Committee (JISC) and the Publishers Association Guidelines for Fair Dealing in an Electronic Environment (1998) available at <http://www.ukoln.ac.uk/services/elib/papers/pa/fair/intro.html> [accessed on 25 January 2014]

in the print environment. For 300 students this results in a cost of £2,265.<sup>245</sup> Thus there is little scope for distance learning within UK copyright law.

Sections 32 to 36 of the CDPA include an exception that permits copying for educational purposes. Albeit, copyright exceptions have a problematic relationship with technology it is clear that copying for educational purposes is permitted, provided a *reprographic process* is not used.

Therefore, it is no real surprise that the prevalent availability of scanners has caused problems to copyright legislators across the globe.<sup>246</sup> The high cost and size of photocopiers historically meant that the chance of regular households having such a machine was slim and, in addition, copies made from photocopiers were clearly degraded in terms of quality when compared to the original work. However, the inexpensive desktop scanner that many people now own in their homes can create digital copies of protected works quickly and efficiently and to a high standard.

Section 32(3) permits copying for 'the purposes of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions.'<sup>247</sup> Section 36 covers reprographic copying by educational establishments, stating that 1% of a work can be copied in any quarter of the year, but it goes on to state that where a licence is available this should regulate copying. Licences are available for the education sector, therefore universities, schools and colleges would be unwise to rely on Section 36 to digitise copyright material for e-learning. Section 36 of the act means that multiple copying of copyright works either for the classroom or for e-learning is largely undertaken in the UK under licence from the reprographic rights organisation, the Copyright Licensing Agency.<sup>248</sup> It would be of benefit if section 36 was amended to include distance learning.

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<sup>245</sup> Clearing the Way: Copyright Clearance in UK Libraries, Gadd E, 2001.

<sup>246</sup> A Gowers. In January 2008, the UK Intellectual Property Office issued a follow-up document entitled Taking forward the Gowers review of intellectual property – proposed changes to copyright exceptions (available at <http://www.ipso.gov.uk/consult-copyrightexceptions.pdf> [accessed on 25 October 2014]) makes suggestions and raises questions as a basis for further discussions

<sup>247</sup> <http://www.opsi.gov.uk/advice/psi-regulations/uk-report-reusepsi-2009.pdf>

<sup>248</sup> Another, yet related question is to what extent permitted copying can be carried out by a third person, such as a librarian or teacher. The CDPA explicitly allows such copying for the purposes of non-commercial research and private study in sec 29(3) CDPA as well as, for librarians, in sections 38 and 39 CDPA

The CDPA describes the exceptions and limitations as ‘permitted acts’, These permitted acts relate to issues of infringement and do not observe closely the right or obligations that restrict a specific act.<sup>249</sup> There is a growing list of circumstances in which it is not possible to contract to all the permitted acts. Fair dealing which forms a large part of the exception in the CDPA for education does not accommodate the ever-increasing non-contextual media use for study and research and distance learning.

The Copyright Licensing Agency has stated that there needs to be clearer provisions in place specifically for educational programs, particularly distance learning.

The case *Hubbard v. Vosper*<sup>250</sup> sets out the main test for fairness; the defendant proved that the work was encompassed on the long enumerative list. Furthermore, let it be known that the first major judicial attempt to define the concept of ‘fairness’ with respect to the fair dealing provisions contained, at that time, in section 6 of the 1956 Copyright Act. Cyril Vosper, a former member of the Church of Scientology, wrote a book that relied extensively on a book written by Lafayette Ronald Hubbard, the founder of the Church. An issue was whether Vosper’s use infringed Hubbard’s copyright. In denying an application for an injunction, Lord Denning stated that whether a dealing is fair is a matter of fact and degree and all the circumstances of a particular case must be taken into account.<sup>251</sup>

#### 4.3. United States

Against SA and the UK’s fair dealing, US fair use has been supported as the most supple and ideal model for copyright law. In pursuant to section 107 of the US Copyright Code embeds the jurisprudence gathered up until the 1976 revision and provides that the “fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching (including multiple copies).<sup>252</sup>

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<sup>249</sup> Consultation on Copyright: Summary of Responses June 2012

<sup>250</sup> (1971), [1972] 1 All E.R. 1023, [1972] 2 W.L.R. 389 (C.A.) [*Hubbard* cited to All E.R.].

<sup>251</sup> A significant exception is my colleague, Carys Jane Craig, whose work I refer to frequently throughout this paper and to whom I am very grateful for sharing her thesis. See Carys Jane Craig, *Fair Dealing and the Purposes of Copyright Protection* (LL.M. Thesis, Queen’s University, 2000) [unpublished] [Craig, *Fair Dealing*].

<sup>252</sup> 17 U.S.C. §107 (2000)

### **4.3.1 General**

It is of importance to comprehend and appreciate the concept of fair use, especially in the context of education.

Far too many educators view almost any material as fair which in their minds allows them to access the fair use provisions, simply because it is being used in an educational setting.<sup>253</sup>

Fair use is extremely broad and is loosely written to increase the extensiveness of its current scope, but allows for limited uses of material that is protected by IP laws, without obtaining the permission of the owner. Fair use attempts to establish certain uses that, in specified and limited ways, are justifiable in order to achieve a greater good.<sup>254</sup>

There are four determining factors/criteria that must be fulfilled for fair use to subsist. The four factors of determining fair use are: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit education purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the”.<sup>255</sup>

### **4.3.2 Provisions**

The provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that Section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

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<sup>253</sup> Pamela Samuelson, Unbundling Fair Uses, U.C. Berkeley Public Law Research Paper No. 1323834 (2009)

<sup>254</sup> Carol Silberberg, Preserving Educational Fair Use in the Twenty-First Century, 74 SCALR 617 (2001)

<sup>255</sup> Kenneth Crews, The Law of Fair Use and the Illusion of Fair Use Guidelines, 62 Ohio St. L.J. 599 (2001)

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. Therefore, there are factors that must be considered when determining that a use of a work is fair. The four factors are not exhaustive, making it easily adaptable to case law.<sup>256</sup>

### 4.3.3 Exceptions and Limitations

The loose set of standards as set in broad criteria is for the courts to consider when determining whether a particular use is fair. First, the preamble to section 107 lists six examples of types of uses that is more likely to be permissible, stating:

*“[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”<sup>257</sup>*

Section 107 is thus open-ended and has the advantage of being flexible when it comes to new kinds of uses. The use of the word “shall” in section 107 indicates that the courts must, as a minimum, consider these four factors in their fair use analysis.<sup>258</sup> On the other hand however, the uncertainty of fact-specific inquiries leave the decision to be based on an abundant case law.

The statute instructs courts to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”<sup>259</sup> Courts’ main inquiry under this factor is whether the defendant took too large a portion of the plaintiff’s original work to qualify for a fair use defence.<sup>260</sup> In general, the more the defendant takes the less likely it will be fair use.

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<sup>256</sup> Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005, 156 U. Pa. L. Rev. 549, 563-64 (2008)

<sup>257</sup> 17 U.S.C § 107; H.R.Rep. (1976), reprinted in U.S. Copyright Office, Circular 21

<sup>258</sup> Kenneth Crews, The Law of Fair Use and the Illusion of Fair Use Guidelines, 62 Ohio St. L.J. 599 (2001)

<sup>259</sup> 17 U.S.C. § 107.

<sup>260</sup> Melville B. Nimmer and David Nimmer, Nimmer on Copyright § 13.05[D][1] at 139 (2007)

Some commentators assert that taking the plaintiff's entire work can never be fair use except in "very limited situations" where the defendant copies the entire work "for a different functional purpose."<sup>261</sup>

Thus if the functional purpose is to copy a complete reproduction of a work for the dissemination particularly for access to accurate educational material amongst distance learners remains unclear as to whether this would qualify as fair use.

Section 110(1) permits teachers and students in a nonprofit educational institution to perform or display any copyrighted work in the course of face-to-face teaching activities.<sup>262</sup> In face-to-face instruction, such teachers and students may act out a play, read aloud a poem, display a cartoon or a slide, or play a videotape so long as the copy of the videotape was lawfully obtained but whether the same should be said for distance learners that if the material was acquired lawfully the controlled distribution to students on a particular course should be acceptable.<sup>263</sup> In essence, section 110(1) permits performance and display of any kind of copyrighted work, and even a complete work, as a part of face-to-face instruction and should be further extended to distance learners.

Section 110(2) permits performance of a nondramatic literary or musical work or display of any work as a part of a transmission in some distance learning contexts, under the specific conditions set out in that section.<sup>264</sup> Section 110(2) does not permit performance of dramatic or audiovisual works as a part of a transmission.<sup>265</sup> Educators may make performances and displays of copyrighted non-dramatic literary or musical works during digitally transmitted courses that are part of the normal offerings of a nonprofit institution or governmental body, as long as the transmitted materials are directly related to the instruction and the transmission is made for reception in a place normally devoted to instruction, or to disabled persons.<sup>266</sup>

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<sup>261</sup> Melville B. Nimmer and David Nimmer, Nimmer on Copyright § 13.05[D][1] at 139 (2007)

<sup>262</sup> Section 110(1) of USA Copyright Act of 1976

<sup>263</sup> Section 110(1) of USA Copyright Act of 1976

<sup>264</sup> Section 110(2) of USA Copyright Act of 1976

<sup>265</sup> Section 110(2) of USA Copyright Act of 1976

<sup>266</sup> William Fisher and William McGeeveran, The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age, Produced by The Berkman Center for Internet and Society at Harvard Law School, Research Publication No. 2006-09

The statute further requires that the transmission be directly related and of material assistance to the teaching content of the transmission and that the transmission be received in a classroom or other place normally devoted to instruction or by persons whose disabilities or special circumstances prevent attendance at a classroom or other place normally devoted to instruction.<sup>267</sup>

In some cases students and teachers in distance learning situations may want to perform and display only small portions of copyrighted works that may be permissible under the fair use doctrine even in the absence of these guidelines. Given the specific limitations set out in section 110(2), however, the participants believe that there may be a higher burden of demonstrating that fair use under Section 107 permits performance or display of works.<sup>268</sup>

One of the enumerated categories identified in the preamble is copying for the purposes of “teaching” and explicitly includes making “multiple copies for classroom use” as a favoured activity.<sup>269</sup> Transformative work, in a learning-promoting environment outside traditional educational contexts, has applied a broader notion of transformativeness and has qualified as fair use. And these broader notions allowed varying degrees of wholesale reproduction to qualify as fair use. Another case held that printing a psychologist’s entire research tool in a psychology textbook was “productive” because the textbook was designed for higher learning and the textbook author attempted to engage college students in critical analysis of the copied material.<sup>270</sup> Promoting Access to Information is more surprising. The courts found the defendants’ uses to be fair due to their distinct and socially beneficial purposes although the defendants made exact or nearly exact mechanical reproductions of the original works.

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<sup>267</sup> L Weinreb ‘Fair’s fair: a comment on the fair use doctrine’ (1990) 103 *Harvard Law Review* 1137, 1138.

<sup>268</sup> D Nimmer “‘Fairest of them all” and other fairy tales of fair use’ (2003) 66 *Law and Contemporary Problems* 263 at 281

<sup>269</sup> 17 U.S.C. § 107.

<sup>270</sup> See *Rubin v. Brooks/Cole Publishing*, 836 F.3d at 916 (though apparently limiting fair use holding to defendant academic publisher’s past uses of the work and requiring future publishers to obtain permissions)

For example *unified School District v. California Department of Education*, 371 F. Supp. 2d 1170, 1177(C.D. Cal 2005) (wholesale copying and distribution of test protocols to give to parents of special education children was fair use because it was possibly transformative and at any rate served valuable public function).<sup>271</sup> It is submitted that the case mentioned suggest a trend and that “educational users might fare better under these broader articulations of the transformativeness standard.”<sup>272</sup>

However, the expanded notion of transformativeness has not been applied in formal educational contexts but maybe extremely effective access to educational material while promoting access to information. *Basic Books v. Kinko’s Graphics Corp.*<sup>273</sup> is the US “course packs” case. The use of copyrighted material for educational purposes by a commercial enterprise were not qualified as fair use because the copies were non-transformative and of economic gain.<sup>274</sup> On the other hand, the *Williams & Wilkins* case, whereby medical copies from a journal were disseminated to researchers.<sup>275</sup> The court found that the purposes of study and research were acceptable here, as these were “socially useful” objectives.

#### **4.4. The Digital Millennium Copyright Act (DMCA) of 1998 (US)**

The DMCA was enacted in 1998. It was advanced to encourage obligations imposed on the United States by the 1996 WIPO Copyright. The concerns of copyright holders were perpetuated by the increased prevalence in the quantity of illegal copying in a networked internet driven digital world.<sup>276</sup>

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<sup>271</sup> Audrey Wolfson Latourette, Copyright Implications for Online Distance Education, 32 J.C. & U.L. 613 (2006)

<sup>272</sup> See William Fisher and William McGeeveran, The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age, Produced by The Berkman Center for Internet and Society at Harvard Law School, Research Publication No. 2006-09, 56 (August 10, 2006)

<sup>273</sup> 758 F. Supp. 1522 at 1531 (S.D.N.Y. 1991) [*Basic Books*] (“[t]he effort utilised in this case was questionable at best and the level of judgment practically non-existent”)

<sup>274</sup> Stephen E. Blythe, “The U.S. Digital Millennium Copyright Act and the E.U. Copyright Directive: Comparative Impact on Fair Use Rights” (2006) 8 Tulane Journal of Technology and Intellectual Property 111 at 129

<sup>275</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1974) [*Williams & Wilkins*]

<sup>276</sup> Alexander, S., Baird, D. 2003. The wrinkle in your research and teaching: Copyright, DCMA, guidelines, and public domain. Paper presented at the eighth annual Mid-South Instructional Technology Conference, Murfreesboro, TN. March.

The DMCA covers a broad range of copyright rules and regulations relating to almost every imaginable manifestation of literary and artistic works which come into contact with the digital medium. Most importantly, the DMCA introduced anti-circumvention provisions which were codified in section 1201 of the US Copyright Act.<sup>277</sup> In short, section 1201 forbids the circumvention of technological protection measures that are put in place by copyright holders.

Access is controlled by banning acts of circumvention.<sup>278</sup> Thus, section 1201 has significant impact on the applicability of the fair use exception, since circumvention is prohibited even if the use of the work would otherwise be a fair use.<sup>279</sup>

Section 403 of the DMCA required a report “on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works.” Section 110(2) of the US Copyright Act <sup>280</sup> permits the display and performance of works during online instruction without the consent of the copyright holder under the following conditions: (1) online instruction at an accredited non-profit educational institution, mediated by an instructor; (2) a policy regarding copyright is instituted by the institution; (3) informational materials regarding copyright are provided by the institution; (4) a notice to students is provided by the institution that materials used in connection with the course may be subject to copyright protection; (5) the transmission of the material is intended solely for receipt by students officially enrolled in the course for which the transmission is made

Additionally, section 110 (2) requires institutions to use technology in a way that will reasonably limit access to copyrighted works to students currently enrolled in the class, to limit access by March 2001 the Copyright Office reported its recommendations to the US Congress.<sup>281</sup> Based on those recommendations, the Technology, Education and Copyright Harmonization (TEACH) Act was enacted on 04 October 2001.

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<sup>277</sup> Section 1201 of the US Copyright Act

<sup>278</sup> Section 1201 contains a third kind of violations called ‘additional violations’.

<sup>279</sup> Stanford University Copyright and Fair Use website,  
[http://fairuse.stanford.edu/stanford\\_notices/etchemendy-2003-03-copyright-reminder.html](http://fairuse.stanford.edu/stanford_notices/etchemendy-2003-03-copyright-reminder.html)

<sup>280</sup> Section 110 (2) of the US Copyright Act

<sup>281</sup> The Register of Copyrights before the Senate Committee on the Judiciary,  
<http://www.copyright.gov/docs/regstat031301.html>,

## 4.5. TEACH (Technology, Education and Copyright Harmonisation) ACT

The TEACH Act of 2001 endeavours to elucidate what materials can be used and in what ways the material can be used to gratify access to educational material.

According, to the Act work in the digital or electronic format and websites, can be used in parts.<sup>282</sup> However, the work must be mediated within a structured environment for distance learners. The TEACH Act further clarifies that work meant for sale for educational purposes, such as educational CDs or textbooks, may not be used or copied in any form without purchase in distance education rights management provision in place.

### 4.5.1 Provisions

The TEACH Act was developed and completed by Congress in 1998.<sup>283</sup> The TEACH Act is designed to accommodate online learning. The purpose of the TEACH Act was to safe harbour the use of digital educational material for distance learning. The details of these provisions are listed in the table 6 below;

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<sup>282</sup> Russell, C. 2002. New Copyright Exemptions for Distance Educators: The Technology, Education and Copyright Harmonisation (TEACH) Act. ERIC Digest. ED470984.

<sup>283</sup> Fisher & McGeeveran, White Paper, supra note 58 at 85-86. See also *ibid.* at 45, citing The Berkman Center for Internet & Society, Digital Learning Legal Background Paper: The TEACH Act: The Impact of Copyright and Compromise on Digital Distance Education at 9, n. 21 [unpublished] [Digital Learning Legal Background Paper], citing Darcy W. Hardy & Georgia Harper, Comments of the University of Texas System at 5, online: United States Copyright Office <<http://www.copyright.gov/disted/comments/init020.pdf>> (indicating that the university seeks licences for all copyrighted material, for lack of confidence in protections provided by fair use). Compare Edward F. Brooks, Comments of the University of North Carolina at Chapel Hill (5 February 1999) at 5, online: United States Copyright Office <<http://www.copyright.gov/disted/comments/init012.pdf>> (indicating that the university encourages professors to take advantage of the fair use doctrine for one-time or first uses of copyrighted material).

**Table 6: Provisions for the TEACH ACT**

<b>Provision</b>	<b>Details</b>
Accredited non-profit institution	Applies to only government bodily or accredited non-profit educational institution
Copyright Policy	The educational institution must have policies regarding copyright
Copyright	Institutions provide informational materials. Materials must be accurately defined
Notice to Students	Notice to students that the material may be subject to copyright protection
Enrolled students	The transmission must be made solely for students officially enrolled in course. It should not be broadcast for other purposes

#### **4.5.2 Exceptions and Limitations**

The TEACH Act precisely addresses the issue of distance learning and thus, provides a useful starting point for more legislation on access to educational material for distance learners.<sup>284</sup> The statute calls for the instructor’s participation in the planning and conduct of the distance education. For an example an instructor seeking to use materials under the protection of the new statute must adhere to the fact that the materials must form “an integral part of a class session offered as a regular part of the systematic mediated instructional activities” of the educational institution.<sup>285</sup> The copyrighted materials used should be of direct assistance for the teaching activity. It is submitted that the requirements serve a common purpose which is to assure that the instructor is ultimately in charge of the uses of copyrighted works which serve for educational pursuits and not entertainment.

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<sup>284</sup> Copyright 2010, Kenneth D. Crews. This work may be used in accordance with Creative Commons, Attribution-Non Commercial-No Derives License. <http://creativecommons.org/licenses/by-nc-nd/3.0/>.

<sup>285</sup> Copyright 2010, Kenneth D. Crews. This work may be used in accordance with Creative Commons, Attribution-Non Commercial-No Derives License. <http://creativecommons.org/licenses/by-nc-nd/3.0/>.

To facilitate access to electronic educational material through the reproduction and distribution in distance learning, there needs to be evaluation of which provisions accommodate, in part, access to the necessary learning material for distance learning (see table 7). This will assist in developing a better framework within copyright law for distance learning.

**Table 7: Characteristics of provisions in SA, UK and USA**

<b>Noteworthy points</b>	<b>SOUTH AFRICA</b>	<b>UNITED KINGDOM</b>	<b>UNITED STATES</b>
<b>Reproduction</b>	<p>Sec 6</p> <p>The reproduction rights are exclusive to copyright owner in any form including digital material.</p> <p>This makes access to educational material for distance learning difficult</p> <p>Section 12(1)</p> <p>fair dealing applies directly to literary and musical works to be copied</p>	<p>Sec 16(1) Copy right owner is granted exclusive rights to copy work. This includes the right to reproduce and distribute</p> <p>CDPA is restrictive and narrow which makes copying of a work for distance learning not Fair to Fair learning difficult</p>	<p>Sec 106 the copyright owner has exclusive rights to reproduction, distribution of copies and preparing of derivative works.</p> <p>Dependent on rife case law</p> <p>Provisions are broad</p> <p>The DMCA and TEACH ACT make the US model for access to educational material for the purpose of learning diverse and applicable to distance learning.</p>
<b>Dissemination</b>	<p>Sec(5)c</p> <p>Issuing of copies on internet is unauthorised publishing</p> <p>E.g. Work loaded</p>	<p>Sec 18 is the distribution right which includes copying of educational material and disseminating on</p>	<p>Sec 107 limited copies can be made the digital transmission of a work or parts thereof are allowed under fair use for educational</p>

	onto a website	internet Sec 17 Depends on the amount of work copied and distributed it should be just parts of. Sec 17(6) Includes transient copies. Sec 32 depends on purpose of instruction	purposes
<b>Recommendation</b>	Expand on Copyright exceptions, limitations and transformative work for distance learning	Restrictive approach if a use does not fall within enumerate list ambit in sec 29-30 It is not included. The defence of private research/study to apply to file sharing for educational purposes should be deemed fair for Distance learners	Courts have four factors applied to determine if the sue of a work is fair.  There is progress made for distance learners in the DMCA and TEACH Act. The flexibility in the fair use model due to much flexibility enables the courts to play an active role in shaping their copyright law.

In summary to this chapter, the fair dealing model in SA is very restrictive and needs to adapt to digital technology. The copyright exceptions and limitation should be expanded and clarified with respect to transformative or derivative works. Furthermore, it is recommended that these exceptions and limitations should make provision for distance learning.<sup>286</sup>

<sup>286</sup> Danthu Thi Pan ‘Will Fair Use Function on the Internet?’ 98 Colum. L. Review (1998) James E. Murrill Jnr. ‘Sounds and Silence: Downloading and Fair Use in A&M Records Inc. v Napster Inc’ 24 Am. J. Trial Advocacy (2000-2001)

In section 12(1) (a) of the SA Copyright Act, is where, “fair dealing ... for the purposes of research or private study by the person using the work” is not an infringement of copyright.<sup>287</sup> This exception is generally understood to cover individual students or learners who make copies for themselves for the purposes of research or private study by the person using the work” is not an infringement of copyright. It is submitted that there is little room for the use of copies that are distributed online for distance learners. Also the role of the educator in disseminating the copies for distance learners remains unclear. Interestingly, the fair dealing position in SA and UK, bare significant similarity, in that it is difficult to compare the relative circumstance of the infringer relative to the list to truly determine whether the use was fair relative to accessing a work for educational purposes.<sup>288</sup>

However, in the CDPA the defence of fair dealing for private research or study does not apply to file sharing because of the fact that file sharing has nothing to do with formal aspects of research or study this has an adverse impact to the sharing of electronic educational copies for distance learning.<sup>289</sup> The UK fair dealing framework does not include limits to copying but instead judges each case on an individual basis, *vis a vis* the enumerate list that is diligently adhered to in SA’s fair dealing framework. The CDPA practice will likely lead to increasing the proportion of work that can be copied under the exception we assume the educational exception is expanded to distance learning.<sup>290</sup>

The other inflexibilities of fair dealing are noticeable in section 29 CDPA as the importance of non-textual learning materials and research has not been fully realised and makes access to educational material in a distance learning model difficult.<sup>291</sup>

Lastly, the fair use exceptions are broad and the relativity is dependent on each unique case. The purpose of use of a work or the circumstance under which a work is used is one of the determinants as to whether it is fair or not.<sup>292</sup>

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<sup>287</sup> section 12(1) (a) of SACRA

<sup>288</sup> Giuseppina D’Agostino ‘Healing Fair Dealing? A Comparative Copyright Analysis of Canada’s Fair Dealing to UK Fair Dealing and US Fair Use’ 53 McGill L.J. (2008)

<sup>289</sup> Robert Danay ‘Copyright vs. Free Expression: The Case of Peer-to-Peer File sharing of Music in the United Kingdom’ Yale J.L. and Tech. (2005-2006) at 45

<sup>290</sup> [http://www.pwc.co.uk/en\\_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf](http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf)

<sup>291</sup> section 29 CDPA

<sup>292</sup> H. Postel ‘The Fair Use Doctrine in the US American Copyright Act and Similar Regulations in the German Law’ 5 Chi-Kent J. Intell. Prop. (2006)

There is no exhaustive list and thus it is submitted that the exceptions are broad and adaptable which enables the active role of the courts in moulding and shaping their copyright law for the benefit of access to educational material in a distance learning model. The capacity of the fair use model has retained relevance in the technological era as demonstrated in section 107 of the USCA.<sup>293</sup>

## 5. Discussion

There is a marked increase in distance learning courses.<sup>294</sup> According to the literature online courses have penetrated 78.09% of undergraduate level programmes and 64.3% doctoral research institutions.<sup>295</sup> The amplified trend towards online learning courses raises questions pertaining to access to educational material online.<sup>296</sup> Digitisation has enabled the rapid copying of content and dissemination thereof to better enable access to learning for all through the digitisation of educational material. However, whether there are sufficient exceptions within copyright law to better facilitate the magnanimous growth of distance learners is debatable.

### 5.1 Summary

The findings show that there is not sufficient room for access to educational material for distance learners in a fair dealing model. This can be demonstrated in the enumerate list that must be adhered to for fair dealing to subsist. This is demonstrated in section 12 of the South African Copyright Act as well as section 32-36 in United Kingdom's Copyright Designs and Patents Act.

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<sup>293</sup> section 107 of the USCA

<sup>294</sup> Lewis, L., Snow, K., Farris, E., & Levin, D. (1999). Distance Education at Postsecondary Education Institutions: 1997–98 (NCES 2000–013). U.S. Department of Education, National

<sup>295</sup> Allen, I. E., & Seaman, J. (2005). Growing by degrees: Online education in the United States. Needham, MA: Sloan Consortium.

<sup>296</sup> Waits, T., & Lewis, L. (2003, July). Distance Education at Degree-Granting Postsecondary Institutions: 2000–2001 (NCES 2003–017). U.S. Department of Education, National Center for Education Statistics. Washington, DC: U.S. Government Printing Office.

However, in the United States there has been development of fair use terms in section 107 that have delivered provisions for multiple copies as long as the four criteria for fair use are fulfilled. Furthermore, the Digital Millennium Copyright Act was implemented which has therein specified provisions for the digitisation of a work for distance learners.

Distance learning was criticised on the grounds that it reduced education to a mere process of industrial production.<sup>297</sup> Scholars were of the opinion that conventional teaching methods were simply adapted to distance learning.<sup>298</sup>

In general, students can learn to an equal level in both learning models. In 2008 the extent to which learners were happy with a distance learning model as compared to face to face teaching suggested that students were generally satisfied with both distance and face-to-face learning.<sup>299</sup>

With traditional learning access to textbooks poses a major problem, especially amongst the poor. There is a counter-intuitive paradox between copyright protection and education. Given that the creation of a work has taken extensive time and effort to create (such as a textbook/study guide). The copyright holder is entitled to economic gain but such gain should never be at the progression of other learners' ability to obtain the necessary resources to complete their education. There needs to be a balance of interests, however, in many low to middle income countries the price tag for education and access to the necessary material is too high.<sup>300</sup>

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<sup>297</sup> Peters, O. (1993). Understanding distance education. In K. Harry, M. Hohn & D. Keegan (Eds.), *Distance education: new perspectives*, London: Routledge, 10-18.

<sup>298</sup> Shaw, K. (2001). Designing online learning opportunities, orchestrating experiences and managing learning. In J. Stephenson. Another paper is; Johnson, D., Sutton, P., & Poon, J. (2000). Face-to-face vs CMC: student communication in a technologically rich learning environment, Retrieved February 20, 2009, from [http://www.ascilite.org.au/conferences/coffs00/papers/daniel\\_johnson.pdf](http://www.ascilite.org.au/conferences/coffs00/papers/daniel_johnson.pdf). (Ed.), *Teaching and learning online: Pedagogies for new technologies*, Sterling, VA: Stylus, 53-66.

<sup>299</sup> Blankson, J., & Kyei-Blankson, L. (2008). Non-traditional Students' Perception of a Blended Course: Integrating Synchronous Online Discussion and Face-to-Face Instruction. *Journal of Interactive Learning Research*, 3 (19), 421-438.

<sup>300</sup> CIPR Report, supra note 26, at 103 (describing survey by Association of Development of Education in Africa that "revealed that shortages of relevant, low- Textbooks involve many contentious issues regarding cultural content, the incorporation of indigenous languages, and so on.

For example, textbooks or bought texts are a rare commodity in developing countries, there is a notable deficiency between the number of textbooks per learner and the number of students required to share that specific resource.<sup>301</sup> A potential solution to this problem, is to promote distance learning and the distribution of content directly to learners on an online website. This website is usually password protected with limited access by student numbers.

The distance learning model promotes remote access to educational materials as the student and teacher are separate and so learning material is disseminated via different modes which include: email, hosting site, postage, brief correspondence and communication via radio.<sup>302</sup> In a distance learning model the storage of a work on ones laptop by a teacher can be considered an illegal copy as the intention of such storage emanates from the intention to reproduce through mass dissemination to various students online. Whether this is allowed in copyright law is brought to question as the right of reproduction and distribution lies with the copyright holder.

## **5.2 International Legislature**

Article 10(2) of the Berne Convention covers the right of users to utilise works through illustration in publication, broadcast and sound recordings for the purpose of teaching provided that teaching<sup>303</sup> a work should have justified purpose and must be compatible with fair practice.<sup>304</sup> This exception may be broad enough to encompass distance learning. The Berne Convention does not restrict the limitation to the right to copy and therefore leaves some scope for the enactment of national instruments.<sup>305</sup>

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<sup>301</sup> CIPR Report, supra note 26, at 103 (describing survey by Association of Development of Education in Africa that “revealed that shortages of relevant, low- Textbooks involve many contentious issues regarding cultural content, the incorporation of indigenous languages, and so on.

<sup>302</sup> Access to knowledge in Africa, the role of copyright Armstrong et al,2010-IDRC ACA2K book

<sup>303</sup> Article 10(2) utilisation encompasses broadcasts and sound or visual recordings, as well as the right of reproduction. In concurrence with this proposition, it is noted in the WIPO Study that it has been suggested there is no reason to exclude online or correspondence teaching from the scope of ‘teaching’ under Article 10(2). WIPO

<sup>304</sup> Article 10(2) of the Berne Convention

<sup>305</sup> STUDY, supra note 14, at 15. 124 See, e.g., The Technology, Education, and Copyright Harmonisation (TEACH) Act, 17 U.S.C. §110(2) (2000).

In TRIPs article 7 the objectives are said to demonstrate that the protection and enforcement of IP rights contribute to technological innovations and transfer the dissemination of technology that is of mutual advantage to the producer and user.<sup>306</sup> Based on this backdrop copyright protection is justified insofar as it meets social and welfare requirements. This would include access to educational material for distance learners. Article 8(2) allows for appropriate measures to be implemented to prevent the abuse of rights. However, in the same section the welfare of the public is of importance. Article 40 enables bulk copying of work and is flexible enough to accommodate distance learning.

The limitless capacity of ICTs is growing and with a propagating digital network and empowers the copying and distribution of educational material for distance learning. Article 6(1) of WCT addresses the exclusive rights of the copyright owner. This includes the right for reproduction and distribution which impedes access to educational material via digital means without first making a request to the copyright holder which can take a long time.<sup>307</sup> Article 10(2) purports that contracting countries may in their national legislature provide exceptions and limitations that are suitable for that specific country this stretches the suitability to provide a national framework that suits the digital environment, different countries were analysed such as SA, UK and USA to explore the different frameworks.<sup>308</sup>

In South Africa section (2)(a) of the SA Copyright Act states that copyright is limited to the copying of substantial parts of content. The term substantial is not defined but is understood in a qualitative sense rather than quantitative. The exceptions are defined in section 12(1)(a), where fair dealing for the purpose of research and private study is considered.<sup>309</sup> This provision covers the individual copy of work which would pertain to face to face scenario and not distance learning.

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<sup>306</sup> TRIPs article 7

<sup>307</sup> Article 6 (1) of the WCT is a useful clarification of the obligations presented in the Berne Convention (and also under the TRIPS Agreement, which includes by reference the relevant provisions of the Convention)

<sup>308</sup> Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA.J. INT'L L. 369 (1997). 131 Or in the case of the WPPT the rights of performers and producers of phonograms. 132 See Preamble to the WCT, supra note 4, Preamble to the WPPT, supra note 5

<sup>309</sup> section 12(1) (b ) Copyright Act No. 98 of 1978

Again a similar statement in section 4 provides that literary work and musical work shall be used by way of illustration refers to face to face learning. There is uncertainty as to whether teachers are included or not. A reasonable part of a work can be reproduced as stipulated in section 13. Albeit, it is unclear whether, the totality of the cumulative effect that occurs copying from one specific book after sometime.<sup>310</sup> Against this backdrop it is difficult to determine whether uploading of work on an access controlled site would be considered reasonable, based on the amount of work uploaded and distributed. Therefore, there is inadequate provision in SA Copyright Act for distance learners.

The UK follows a similar pattern as it also has a long exhaustive list of fair dealing requirements. Exceptions and limitations are described in section 29(3) (2) of CDPA which confers that fair dealing be afforded to research and private use.<sup>311</sup> Section 32 and 36 allows copying for reprographic purposes and for a question and answer sessions, once this work is distributed it no longer forms part of the fair dealing provision. Furthermore, section 36 speaks to the ability to make multiple copies that can be made in the classroom but not for distance learners.<sup>312</sup> The CDPA is stringent and rigid and provides no solution framework for access to educational material online for distance learners.

Section 107 of the USCA has codified the fair use provisions. These provisions are loosely worded to increase the scope and flexibility to the digital arena criteria have been met and fulfilled.<sup>313</sup> Section 106 has included the reproduction of multiple copies for classroom usage. This provision is broadly worded and can be extrapolated to distance learning as long as the four minimum criteria are met.

Section 110(1) allows teachers and students from non-profit organisations to display their work as part of transmission as long as the transmission only last for the duration of the lesson.<sup>314</sup> Thus making headway for distance learners.

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<sup>310</sup> Keegan, D. (3rd ed) (1996) Foundations of Distance Education, London and New York, Routledge

<sup>311</sup> section 29(3)(2) of CDPA

<sup>312</sup> A Gowers. In January 2008, the UK Intellectual Property Office issued a follow-up document entitled Taking forward the Gowers review of intellectual property – proposed changes to copyright exceptions (available at <http://www.ipo.gov.uk/consult-copyrightexceptions.pdf> [accessed on 25 October 2014]) makes

<sup>313</sup> Kenneth Crews, The Law of Fair Use and the Illusion of Fair Use Guidelines, 62 Ohio St. L.J. 599 (2001).

<sup>314</sup> Section 110(1) of USCA

Transformative work may also be used to promote learning beyond the classroom to distance learners. This can provide broader articulation under the transformative standard for distance learners' access to educational material.<sup>315</sup>

The US has also implemented the DMCA whereby section 1201<sup>316</sup> has impact and applicability of fair use exceptions since circumvention is considered prohibition. Section 403 has accommodated interactive digital networks for distance learning. It is submitted that the US have amply adapted their copyright laws to accommodate the digitisation of works for access to educational material for distance learners.<sup>317</sup>

## 6. Conclusion

There are not sufficient exceptions within copyright law for access to digitised educational material for distance learners in South Africa and the United Kingdom. The current exceptions are narrow and limited. Therefore, a recommendation would be to broaden the scope of the provisions to increase the flexibility and better accommodate access to educational material for distance learners in this information age where digital networks and access are growing exponentially. Some countries such as the United States of America have come to this realisation early and have started to accommodate digitisation of works and distance learning models through the Digital Millennium Copyright Act and the codification of fair use model in section 107 of the United States Copyright Act.

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<sup>315</sup> L Weinreb 'Fair's fair: a comment on the fair use doctrine' (1990) 103 *Harvard Law Review* 1137, 1138.

<sup>316</sup> DMCA section 1201

<sup>317</sup> Section 403 of DMCA

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## Statutory

Article 1 of TRIPs Agreement

Article 1(1) of the TRIPS Agreement

Article 1(1) of the WCT

Article 1(2) of WCT

Article 2 of the WCT

Article 2 paragraph 1 and Article 3 7(a) and 9(b) of the appendix

Article 3 of the WCT

Article 3 of Berne appendix paragraph (a) and (b)

Article 6 (1) of the WCT

Article 8 of the TRIPS

Article 9 of the TRIPS

Article 9.1 of the Berne Convention

Article 9(2) of the Berne Convention

Article 10 of WCT

Article 10 (2) of the Berne Convention

Article 10 (2) of the WCT [http://www.wipo.int/edocs/mdocs/diplconf/en/crn\\_dc/crn\\_dc\\_102.pdf](http://www.wipo.int/edocs/mdocs/diplconf/en/crn/dc/crn_dc_102.pdf)

Article 11 of WCT

Article 13 of the TRIPS Agreement

Article 20 of Berne Convention

Article 28 B Greek Copyright Act

Berne Convention 1886, supra note 12, art. 12(1), at p. 22

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Section 2(1) of the South African Copyright Act

Section 12(1)(b) Copyright Act No. 98 of 1978

Section 12(1) (a) of SACRA

Section 12(3) of the Copyright Act No. 98 of 1978

Section 13 of the Copyright Act No 98 of 1978

Section 29 CDPA

Section 29(1) of CDPA 29(3)(2) of CDPA of 1988

Section 29 Copyright, Designs and Patents Act 1988(CDPA)

Section 30 of the UK CDPA of 1988

Section 41(4) Copyright Act No. 98 of 1978

Section 107 of the USCA

Section 110(2) of USA Copyright Act of 1976

Section 1201 of the US Copyright Act

Section 1201 of DMCA

Section 110(1) of USA Copyright Act of 1976

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Section 403 of DMCA

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Trips Agreement Article 7

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[http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html). (Accessed on 18 August 2013)

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